

APPELLATE COURT NO. 71595
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS
AT AUSTIN

RICK ALLAN RHOADES,

Appellant

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM 179TH DISTRICT COURT OF HARRIS COUNTY,
TEXAS

Judge J. Michael Wilkinson Presiding

STATEMENT OF FACTS

VOLUME XXV OF 40 VOLUMES

Marlene Swope
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1 CAUSE NO. 612408

2 STATE OF TEXAS IN THE 179TH DISTRICT COURT

3 VS. OF

4 RICK ALLAN RHOADES HARRIS COUNTY, T E X A S

5
6 A P P E A R A N C E S:

7 For the State: Ms. Carol Davies
8 Assistant District Attorney
Harris County, Texas

9 For the Defendant: Mr. James Stafford
10 Ms. Deborah Kaiser
11 Attorneys at Law
Houston, Texas

12
13 BE IT REMEMBERED that upon this the
14 10th day of September A.D. 1992, the above
15 entitled and numbered cause came on for
16 continued voir dire examination of prospective
17 jurors before the Honorable J. Michael
18 Wilkinson, Judge of the 179th District Court of
19 Harris County, Texas; and the State appearing by
20 counsel and the Defendant appearing in person
21 and by counsel, the following proceedings were
22 had, viz:

1 MARY KING,
2 called as a prospective juror, was examined as
3 follows:

4 EXAMINATION BY THE COURT.

5 Q. This is prospective juror number ten
6 on panel six, Ms. Mary King.

7 Have you been at the same elementary
8 school for twelve years?

9 A. Yes.

10 Q. One of the things you like least is
11 dealing with difficult parents?

12 A. Yes.

13 Q. You have a daughter that works at
14 American General.

15 A. Actually Valet is the company she
16 works for, like it's a subsidiary of American
17 General.

18 Q. Your son, what does he do?

19 A. He works at a bike shop. Bike Route.

20 Q. That is the name of the shop?

21 A. Yes.

22 Q. Concerned about early release. There
23 is a question that says have you or a family
24 member or a close friend ever been arrested or
25 charged with an offense. And said your son was

1 charged in high school. Can you tell me how old
2 he was and what that was about?

3 A. He was, I believe he was a senior in
4 high school. He got in with the wrong crowd.
5 They were breaking into cars on a lot, cars on a
6 parking lot of the school. And he had the
7 speakers and radio, I think, something like
8 that, a few items like that, and he had them
9 there at the house, and they found them. He is
10 on probation. Deferred adjudication.

11 Q. He was seventeen years old when that
12 happened. He came to court down here?

13 A. No, Fort Bend.

14 Q. He was placed on deferred adjudication
15 in Fort Bend County?

16 A. Yes, sir.

17 Q. He is on deferred adjudication now?

18 A. Yes.

19 Q. Does he live at home?

20 A. Yes.

21 Q. What about the other people involved,
22 were they arrested also?

23 A. Yes.

24 Q. Several of them placed on deferred
25 adjudication?

1 A. I really don't know. I think a
2 couple. I am not sure what all happened.

3 Q. Who represented him?

4 A. Roger Barrett.

5 Q. Did you go to court with him in Fort
6 Bend County?

7 A. Yes.

8 Q. How many times?

9 A. Twice, I think.

10 Q. Anything about that experience that
11 was very upsetting? Of course it was upsetting
12 to have him arrested and charged.

13 A. Yeah.

14 Q. Was he treated fairly, in your opinion?

15 A. I think so.

16 Q. Did you know the other people involved?

17 A. Not really.

18 Q. How long ago was that?

19 A. It's a little over four years. My son
20 has always been the type, ever since he was in
21 elementary school, he is not a leader, he is a
22 follower, and he just got in with the wrong
23 group of kids, and that is what happened.

24 Q. Has he had any problems while he has
25 been on deferred adjudication?

1 A. No.

2 Q. Is he still reporting monthly?

3 A. Yes.

4 Q. Was there a large amount of
5 restitution to be paid?

6 A. No.

7 Q. A long time ago, you were on a
8 criminal jury?

9 A. I don't remember anything about that.
10 I mean, you know.

11 Q. Was it down here in Harris County?

12 A. Yes.

13 Q. Do you remember if you reached a
14 verdict in the case?

15 A. Yeah.

16 Q. Do you remember if you participated in
17 deciding what the punishment should be in that
18 case?

19 A. Yes, but.

20 Q. About how long do you think it was?

21 A. It has been four years since I was
22 called the last time. Five years, six years
23 maybe, I am not sure.

24 Q. Pages eight and nine of this long form
25 list statements and ask you to either check the

1 one which best summarizes your general views
2 about capital punishment or ask you to agree or
3 disagree with certain statements. And I have
4 some conflicts with the way you answered. You
5 checked the box which says I am in favor of
6 capital punishment except in a few cases where
7 it may not be appropriate. On the next page you
8 said I do not believe in capital punishment
9 under any circumstances.

10 A. Oh.

11 Q. Do you want to look at it? I am
12 looking at the top, number four on that top
13 one. Then on the next page, I probably have it
14 circled in red on the next page.

15 A. Yeah.

16 Q. There is a pretty big difference in
17 those two statements is what I was looking at.

18 A. Well, I am in favor of capital
19 punishment.

20 Q. On the next page, except for that one
21 statement, it appears you wish it weren't
22 necessary but believe it's necessary for some
23 cases; right?

24 A. Yes.

25 Q. At any rate, you checked the statement

1 which said your decision on whether or not the
2 death penalty should be assessed would depend on
3 the facts and circumstance of the individual
4 case; correct?

5 A. Yes.

6 Q. Since you have been called for jury
7 service in the past, a lot of what we talked
8 about yesterday you were probably familiar with
9 -- presumption of innocence, the defendant is
10 presumed innocent; you agree with that?

11 A. Yes.

12 Q. State has the burden of proof. They
13 have to prove a defendant's guilt beyond a
14 reasonable doubt. Agree?

15 A. Yes.

16 Q. The indictment in a criminal case is
17 no evidence of guilt. Agree?

18 A. Yes.

19 Q. If the defendant does not take the
20 stand and testify in his own behalf, that can
21 not be considered as any evidence of guilt
22 whatsoever.

23 A. Yes.

24 Q. Are you pretty sure the case you were
25 called on last time wasn't a murder case?

1 A. No, it wasn't. No, it wasn't murder.

2 Q. With murder, we are talking about
3 usually a first degree felony offense, the range
4 being five to 99 years or life. What we call
5 sometimes simple murder or straight murder,
6 somebody intentionally or knowingly causing the
7 death of another person. When we are talking
8 about capital offense we are talking about one
9 where the only possible punishments are life or
10 death if somebody is convicted of capital
11 murder. So capital murder is at the top of the
12 scheme of things. Stair-stepping down, we
13 talked about lesser included offenses, murder,
14 first degree felony, second degree felony
15 offense of voluntary manslaughter, third degree
16 felony offense, involuntary manslaughter, with
17 reduced ranges of punishment as we go down the
18 scheme through the felonies all the way to
19 misdemeanor. But at the top it's capital
20 murder. I had asked if you had participated in
21 assessing punishment in that previous trial you
22 sat on to see if you remember going through that
23 second stage. After the jury finds a defendant
24 guilty, there is a second stage of trial where
25 additional evidence may be presented. You may

1 receive evidence about a defendant's background
2 or reputation or prior criminal acts, previous
3 criminal convictions, if any. It's usually
4 helpful for jurors when they go back to assess
5 the appropriate punishment. The same happens in
6 a capital murder case. If the jurors find the
7 defendant guilty of capital murder, we know that
8 the only possible punishments are life or
9 death. We have the second stage of trial, the
10 penalty stage, where again you may hear
11 additional evidence. That might be the time
12 when you would hear something brought forth that
13 you might consider mitigating. Mitigating
14 against the imposition of the death penalty.
15 When the jury goes back to deliberate on a
16 capital murder case after having found guilty of
17 capital murder, we don't ask the jury to vote
18 life or death; instead, we ask them to answer
19 certain questions, certain special issues. Did
20 you understand that is how it worked in a
21 capital murder case before you came in here the
22 other day?

23 A. Yes.

24 Q. The various ways that we can get to
25 capital murder from the murder offense are set

1 out in our statutes, and I told you about six
2 different statutory ways that murder is elevated
3 to capital murder status, everything from the
4 victim being a fireman or policeman in the
5 lawful discharge of an official duty to murder
6 for hire cases, to where somebody is in the
7 course of committing another felony offense,
8 robbery, burglary, kidnapping, arson, aggravated
9 sexual assault and murders that person, that is
10 a capital murder offense. The kind of murder
11 offense that we are trying elevated to capital
12 murder status is where someone murders more than
13 one person in the same criminal transaction. It
14 can be a number of people, it can be as few as
15 two people. The allegation in the case we have
16 is two people murdered in the same criminal
17 transaction.

18 Are all those different ways of
19 elevating murder to capital murder status things
20 that you think should be capital offenses?

21 A. --.

22 Q. On conviction, should result in a life
23 sentence or the death penalty?

24 A. Yes.

25 Q. Now, as I said before, if you find

1 someone guilty of capital murder and you go back
2 to deliberate after the second stage of trial,
3 you are asked to answer those special issues
4 which I will refer back and forth to over here
5 on this board. The first one asks do you find
6 from the evidence beyond a reasonable doubt that
7 there is a probability that the defendant would
8 commit criminal acts of violence that would
9 constitute a continuing threat to society. That
10 is the issue where we are asking the jury to
11 make determination of the defendant's future
12 dangerousness. I would instruct the jury that
13 they are to consider all the evidence admitted
14 at the guilt or innocence stage and all the
15 evidence at the punishment stage including
16 evidence of a defendant's background and
17 character or the circumstances of the offense
18 that militate for or mitigate against the
19 imposition of the death penalty. Consider all
20 that information when you are answering special
21 issue number one. By probability we mean more
22 likely to occur than not. And that last term,
23 society, while it won't be defined for you,
24 includes all of society, including prison
25 society. It's probably something you have

1 never thought of before. It includes all of
2 society when you are answering special issue
3 number one. The jury answers that question yes
4 or no, all twelve jurors have to agree
5 unanimously to return a yes answer. Ten or more
6 have to agree to return a no answer. If the
7 jury answers no, there is no such probability, I
8 assess life imprisonment. If the jury answers
9 yes unanimously, there is such a probability,
10 then they proceed to special issue number two.
11 As to special issue number one -- excuse me just
12 a second.

13 Could you step outside this door for
14 just a moment?

15 (The prospective juror leaves the
16 courtroom)

17 MS. DAVIES: Your Honor, I asked you
18 to break in the interest of time. We have a lot
19 of jurors sitting out there. I am going to use
20 a peremptory strike.

21 THE COURT: State is striking
22 prospective juror number ten on panel number
23 six, Mrs. Mary King.
24
25

1 JOSEPH E. SHEEHAN

2 called as a prospective juror, was examined as
3 follows:

4 EXAMINATION BY THE COURT.

5 Q. This is prospective juror number
6 twelve on panel number six, Mr. Joseph Sheehan.
7 Same job fifteen years basically?

8 A. Yes, sir.

9 Q. What route do you travel?

10 A. Right now, I drive from Houston to
11 Mobile, Alabama.

12 Q. How often?

13 A. Every other night.

14 Q. Is that about seven hours or more?

15 A. About eight or nine.

16 Q. Two children. One works as security
17 at -- I can't read this.

18 A. M. Pace.

19 Q. M. Pace?

20 A. M. Pace Security.

21 Q. What kind of security is that?

22 A. They do security for hotels, stores.

23 Q. Is that here in Houston?

24 A. I believe they are out off of 290 and
25 Beltway 8.

1 Q. You have another child in Penn State?

2 A. Yes, sir.

3 Q. He is twenty-five. Is he a graduate
4 student?

5 A. He is doing it for the Navy. He is
6 out of the Navy to get his degree to go back
7 into the Navy.

8 Q. How long were you in the Navy?

9 A. Four years.

10 Q. There is a bumper sticker question.
11 The Hundred Club. A lot of people have bumper
12 stickers on cars they didn't buy. Are you a
13 member of the One Hundred Club?

14 A. Yes.

15 Q. Last movie you saw in a theater was
16 "Red October". It has been awhile?

17 A. Yeah. It was up in Virginia.

18 Q. Pages eight and nine of this long form
19 questionnaire list statements and ask you to
20 check the one which best summarizes your views
21 about capital murder or ask you to either agree
22 or disagree with certain statements. Number 61,
23 you didn't answer that question. Gives you
24 choices of being opposed to, neither opposed to
25 nor in favor of, strongly in favor of. But on

1 the next page, in summary, it appears that you
2 do not believe in capital punishment but you
3 don't think it should be abolished, you wish it
4 weren't necessary and you don't believe in it
5 but you believe we must have it for some
6 offenses. Is that basically right?

7 A. Yes.

8 Q. At any rate, you checked the box which
9 says your decision on whether or not the death
10 penalty should be assessed would depend on the
11 facts and circumstances of the individual case.
12 Correct?

13 A. Yes, sir.

14 Q. Have you ever been called for jury
15 service before?

16 A. Yes, sir.

17 Q. Have you ever been selected?

18 A. One time for civil.

19 Q. Have you ever gone through the
20 examination process on a criminal case?

21 A. No, sir.

22 Q. Let's go over some of the general
23 principles we talked about yesterday. We
24 discussed presumption of innocence. As the
25 defendant sits in court, he is not a little bit

1 guilty. He is presumed innocent. Do you agree?

2 A. Yes, sir.

3 Q. Burden of proof is on the State to
4 prove his guilt beyond a reasonable doubt.
5 Agree?

6 A. Yes, sir.

7 Q. The indictment which I read to you
8 yesterday is no evidence of guilt whatsoever.
9 Agree?

10 A. Agree.

11 Q. If a defendant does not take the stand
12 and testify in his own behalf, that can not be
13 considered as any evidence of guilt whatsoever.
14 Agree?

15 A. Agree.

16 Q. We talked about the distinction
17 between murder and capital murder. When we say
18 murder, we sometimes say straight murder, plain
19 murder, first degree felony offense of murder.
20 Somebody intentionally or knowingly causing the
21 death of another person. When we are saying
22 capital murder, we mean a murder but some other
23 additional aggravating factor that makes it
24 capital murder, to elevate it to capital murder
25 status. A first degree felony offense of murder

1 has a range of punishment of from five to 99
2 years or life. Capital murder has only two
3 options. If one is convicted of capital murder,
4 he either receives the death penalty or life
5 imprisonment as a sentence. Did you understand
6 that?

7 A. Yes.

8 Q. Did you know that before you came in
9 here yesterday?

10 A. Yes. No. Excuse me. No, I did
11 not.

12 Q. We asked the jurors on this
13 questionnaire at some point whether or not they
14 think capital murder should apply to more
15 offenses than it already does, and most don't
16 have any kind of idea how many kinds of offenses
17 it applies to right now. I ran through that
18 list of six different ways in which murder can
19 be elevated to capital murder status. Somebody
20 murdering a peace officer or fireman in the
21 lawful discharge of an official duty, someone
22 who commits murder for hire, someone who murders
23 an employee in a penitentiary while he is an
24 inmate in the penitentiary, someone who is
25 escaping from or attempting to escape from the

1 penitentiary and murders someone, someone who
2 murders another person while he is in the course
3 of committing felony offense of kidnapping,
4 burglary, robbery, arson or aggravated sexual
5 assault. And the final category we have is
6 where someone murders more than one person in
7 the same criminal transaction. That is the kind
8 of case we have to try. The allegation in the
9 indictment is that two people were murdered in
10 the same criminal transaction. Are all those
11 different kinds of ways of committing the
12 offense what you think should be capital murder
13 offenses, that is, on conviction of those six
14 categories somebody should receive either a life
15 sentence or the death penalty?

16 A. --.

17 Q. Some people think more things should
18 apply.

19 A. I don't know how to answer that.

20 Q. Well, if you had to write the law, do
21 you think you would include some of those things
22 that I just did?

23 A. Yes.

24 Q. We talked about lesser included
25 offense, that you might receive a charge to the

1 effect that if you did not believe the defendant
2 had committed the offense of capital murder you
3 might be asked to next consider lesser included
4 offenses. I stair-stepped through them. Murder,
5 first degree, voluntary, second degree, third
6 degree would be involuntary, on down to the
7 misdemeanors. I might be obligated to put in
8 the charge, without commenting at all on whether
9 or not I thought one of those was the
10 appropriate offense that the jury should
11 consider in determining guilt.

12 Did you understand that in a criminal
13 case the trial is in two stages? The first
14 stage is where the jury listens to the evidence
15 and goes back and makes the determination as to
16 guilt. If the jury returns a verdict of
17 guilty, there is a second stage of trial.

18 A. Yes.

19 Q. Additional evidence may be
20 presented. That might be the time when a jury
21 would hear evidence of a defendant's background,
22 reputation, prior bad acts, previous criminal
23 convictions, if they exist. Those kind of
24 things most jurors would think would be helpful
25 in determining the appropriate penalty. In a

1 capital murder case, there is a second stage of
2 trial if the defendant is found guilty of
3 capital murder. You might hear additional
4 witnesses testify. There may be additional
5 evidence for you to consider. You might hear
6 things that you would think would be mitigating
7 circumstances. Neither side has to bring you
8 anything in that second stage of trial. But
9 either side may if they want to. When I send
10 you back in the second stage of a capital murder
11 case, you are not going back to vote for life or
12 death; you have to, instead, answer certain
13 questions, but you get to know in advance that
14 the way you answer those questions is going to
15 determine how I assess the penalty. First
16 question we would ask you is special issue
17 number one over here on the blackboard. Do you
18 find from the evidence beyond a reasonable doubt
19 that there is a probability the defendant would
20 commit criminal acts of violence that would
21 constitute a continuing threat to society. This
22 is the special issue where we are asking you to
23 make a determination of the defendant's future
24 dangerousness. I would instruct you that you
25 are to consider all the evidence admitted at the

1 guilt-innocence stage and the punishment stage,
2 including evidence of the defendant's background
3 or character or the circumstances of the offense
4 that militate for or mitigate against the
5 imposition of the death penalty. By
6 probability, in common usage, we mean more
7 likely to occur than not. And that last word
8 "society", that is a term that is not going to
9 be defined in the Court's Charge, but we know it
10 means all of society, including society within
11 the penitentiary system. Can you see that?

12 A. Yes, sir.

13 Q. We ask the jury to answer that yes or
14 no. It takes all twelve jurors agreeing
15 unanimously to answer yes, return a yes
16 answer. It takes ten or more agreeing to
17 return a no answer. If the jury says no there
18 is not a probability the defendant would commit
19 criminal acts of violence constituting a
20 continuing threat to society, I assess life
21 imprisonment. If the jury answers unanimously
22 yes there is such a probability, the jury then
23 proceeds to number two. Can you see how number
24 one could sometimes be answered yes, sometimes
25 no, depending on the facts and circumstances you

1 have before you?

2 A. Yes.

3 Q. The answers aren't automatic in either
4 case.

5 A. No.

6 Q. Sometimes you don't have all that
7 extra information from the second stage of trial
8 about reputation, background, prior bad acts.
9 Sometimes all you have is the offense committed
10 that you found him guilty of. Do you see how
11 there are some cases where the facts surrounding
12 the commission of the capital murder offense
13 would be so horrible that based on the way that
14 defendant committed that offense alone a jury
15 could find there would be a probability he would
16 commit criminal acts of violence constituting a
17 continuing threat to society?

18 A. Yes, sir.

19 Q. If the jury answers number one yes,
20 you proceed to number two. Number two is asking
21 whether, taking into consideration all of the
22 evidence, including the circumstances of the
23 offense, the defendant's character and
24 background and personal moral culpability of the
25 defendant, there is a sufficient mitigating

1 circumstance or circumstances to warrant that a
2 sentence of life imprisonment rather than a
3 death sentence be imposed. I would instruct you
4 that you are to consider mitigating evidence to
5 be evidence you might regard as reducing a
6 defendant's moral blameworthiness. You have to
7 answer this one yes or no also. Here it takes
8 all twelve jurors agreeing unanimously to return
9 a no answer. Ten or more can return a yes
10 answer. A yes answer meaning there would be
11 sufficient mitigating circumstance or
12 circumstances to warrant life imprisonment
13 rather than a death penalty. In that case, a
14 no answer on -- I'm sorry -- a yes answer on
15 number two, I would assess life imprisonment.
16 Only if the jury unanimously answers number two
17 no after a unanimous yes on number one do I
18 assess the death penalty. You get to know that
19 in advance. Only a yes, no, number one and
20 number two, respectively, results in the death
21 penalty.

22 Mitigating circumstances. What are
23 they? I don't know what all that includes.
24 Our statutes aren't very clear. They don't set
25 out exactly or limit the aspects of a

1 defendant's background, character or the
2 circumstances of the offense, that kind of
3 thing, that are mitigating, and the law doesn't
4 impose any kind of formula for determining how
5 much weight to give a mitigating circumstance
6 should you hear about them. I don't know if
7 that is twenty items long or twenty thousand
8 items long, things that might be mitigating to
9 jurors in proper cases. You decide if what you
10 have heard is mitigating in that case and how
11 much weight to give it. You might feel that
12 something like drug dependency deserves a lot of
13 weight, and another juror on the same jury might
14 decide it doesn't deserve a whole lot of
15 weight. That is up to you. While we don't have
16 a list of everything that is included, we know
17 that certain things can be mitigating in proper
18 cases. We know that mental retardation, mental
19 illness are mitigating. Mitigating evidence can
20 include such things as a defendant's good
21 behavior while he is in prison or in jail. Can
22 include an exceptionally unhappy or unstable
23 childhood, childhood drug abuse, economic
24 deprivation, it can include youth, a defendant's
25 age, voluntary intoxication, drug dependency,

1 illiteracy, opinion testimony of lay witnesses
2 or psychiatric opinion testimony that a
3 defendant would be a danger in the future. All
4 of those things in the proper case could be
5 mitigating circumstances. If you hear about
6 those or any others that you think are
7 mitigating, you decide how much weight to give
8 it in answering number two. Do you understand?

9 A. Yes, sir.

10 Q. Do you see how the answers to these
11 special issues aren't automatic, they are
12 sometimes yes, sometimes no, depending on what
13 you have to review?

14 A. Yes.

15 Q. We want to make sure that you are not
16 automatically predisposed to answer a certain
17 way simply to insure that a life sentence
18 results or the death penalty results.

19 Is there anything about your views
20 regarding capital punishment, the death penalty
21 which would prevent or substantially impair the
22 performance of your duty as a juror in
23 accordance with the instructions I would give
24 you and your oath as a juror?

25 A. No, sir.

1 THE COURT: Ms. Davies.

2 EXAMINATION BY THE STATE

3 BY MS. DAVIES:

4 Q. Hello, Mr. Sheehan. How long have you
5 been driving the route between Houston and
6 Mobile?

7 A. I am just starting it. I used to drive
8 from Houston to New Orleans.

9 Q. Do they change your route regularly?

10 A. It all depends. Three or four
11 months, they change.

12 Q. Get tired of driving the same road on
13 a regular basis, or is that just part of it?

14 A. Normally I drive the same road anyway
15 because I used to drive to Tallahassee.

16 Q. Well, we want to find out a little bit
17 more today, if we can, about your attitudes and
18 opinions. You have had overnight to think about
19 some of these things since we talked yesterday.
20 I am interested to know what your first reaction
21 was when you got this questionnaire and realized
22 that you might be sent over on a case that might
23 involve the death penalty.

24 A. Do you want to know what my reaction
25 was?

1 Q. Yes.

2 A. I had no reaction, I don't believe. I
3 just figured I would be on a case, that they
4 wanted to know a little bit about me.

5 Q. Okay. So, when you got this
6 questionnaire -- you said you really haven't
7 been on a jury before?

8 A. No.

9 Q. You might very well have thought that
10 every juror who comes in gets such a
11 questionnaire?

12 A. Yes.

13 Q. Once you were up here and you realized
14 that in fact this was a case that would involve
15 the possibility of a death penalty, was there
16 any reaction then? How do you feel about that?

17 A. There was no reaction. I guess it's
18 something I have to do.

19 Q. Tell me what -- do you think the death
20 penalty is necessary in some cases?

21 A. That is hard to answer.

22 Q. Well.

23 A. You have to know what the full case is
24 before you can make a decision.

25 Q. Oh, right. I understand that. And,

1 unfortunately, we can't tell you about the facts
2 of this case. I am not asking what you would
3 do in this case. I am asking in some instances
4 do you think the death penalty is appropriate?

5 A. Yes.

6 Q. Can you tell me why? I mean, have you
7 given any thought to that? I mean, do you think
8 it's necessary to protect society?

9 A. No, I cannot. I can't tell you
10 why. It's just, I don't know.

11 Q. Have you ever had a change of
12 opinion? At some other point in your life, did
13 you think differently about that?

14 A. No. Never thought about it.

15 Q. Did you give any thought last night to
16 whether or not you personally would be able to
17 participate in a verdict that was going to
18 result in the death penalty?

19 A. No, not really.

20 Q. Could you do it?

21 A. I don't know. I really don't know if
22 I could or not.

23 Q. You know, for a lot of people, they
24 come on strong and say I believe in the death
25 penalty, it's necessary for society, but then,

1 when it comes down to they know that they
2 couldn't do it personally. Of course, here you
3 are kind of -- you are at it. You're facing the
4 situation now because, if you are on the jury,
5 those people who serve on the jury take an oath
6 to base their verdict on the law and the
7 evidence. We are here to see, hopefully, there
8 is a fair trial. The defendant has many
9 constitutional rights that will be protected.
10 My attitude is, for anything to be fair, that
11 means both sides.

12 A. Okay.

13 Q. Do you agree with that?

14 A. Yes.

15 Q. So, obviously, nobody wants anybody
16 who is going to automatically answer those
17 questions one way or the other, but I need to be
18 sure that if I bring the evidence in that
19 justifies it that people on that jury can
20 actually participate in a verdict that is going
21 to result in the death penalty, not face some
22 kind of moral crisis back there in the jury
23 room. I need you to think about that and try to
24 be real open with me about it.

25 A. I could. If I had to, I could

1 probably bring a sentence of death if I had
2 to. Like I said, I can't answer that now
3 because I don't know what the circumstances
4 are.

5 Q. Okay. Well, in your mind would there
6 ever be a case that you think deserves the death
7 penalty, that you could be a part of a verdict
8 of a jury that, I mean, might be called on to
9 write your name on that verdict page.

10 A. I don't know.

11 Q. You are making it awfully hard for me,
12 Mr. Sheehan.

13 A. What can I tell you?

14 Q. Do you feel like you are the kind of
15 person who -- I mean, you are insulated here,
16 you know that you don't say life or death, you
17 answer those questions yes or no, and depending
18 on how the question is answered, the judge is
19 the one who imposes the sentence, but you know
20 going in, that if you answer the first question
21 yes and the second one no, the judge is going to
22 give the death penalty, he has no choice. So, a
23 jury certainly, any juror can manipulate their
24 answers to achieve the result they want. Do you
25 feel like you would be inclined to try to avoid

1 the death penalty?

2 A. I don't think so.

3 Q. If the evidence was there, you would
4 do it?

5 A. Yes.

6 Q. I guess -- I am looking at you --
7 could the evidence ever be there? Could I bring
8 you enough evidence to convince you?

9 A. Could you bring me enough evidence? I
10 don't know. Could you?

11 Q. I am sure going to try. That is my
12 job. But I am wanting to know what is in your
13 mind. I mean, is there a situation -- I feel
14 like you are daring me here. And I understand
15 it's a big job. It's a heavy burden.

16 A. It's a hard job.

17 Q. I take it seriously. I shoulder the
18 burden gladly, but I want to be sure I have got
19 somebody sitting in that jury box who if I do my
20 job they can answer those questions and come
21 back with the death penalty.

22 A. I could. I could answer the
23 question. I mean, I could possibly -- not
24 possibly -- if I had to and I had all the
25 evidence, yes, I would give the death penalty.

1 Okay?

2 Q. Okay. What about some of the things
3 we talked about yesterday, did you have any
4 questions, disagree with any of the things we
5 talked about that you want to mention to us?

6 A. No.

7 Q. You know, one of the phrases that we
8 have used a lot is beyond a reasonable doubt.
9 Keep talking about the State has to prove this
10 beyond a reasonable doubt. And the burden of
11 proof is on me. They don't ever have to bring a
12 thing. That is true at both stages of trial.
13 I have got to produce the evidence to convince
14 the jury beyond a reasonable doubt. There is a
15 legal definition of that term and a lengthy
16 instruction that the judge gives you about just
17 what beyond a reasonable doubt means. A part of
18 that instruction makes clear that it is not
19 beyond all doubt. Some people come in here and
20 tell me: Hey, you are talking capital murder,
21 you are telling me you are going to be asking
22 for the death penalty, I have to have all doubt
23 removed. Beyond a reasonable doubt just isn't
24 enough for me. Do you feel that way? I need to
25 know it if you do.

1 A. Yes.

2 Q. You are going to require more of me
3 than beyond a reasonable doubt; is that what you
4 are telling me?

5 A. I don't know.

6 Q. Let's think about what beyond a
7 reasonable doubt means. I mean, for you.
8 Again, I am not suggesting that it's anything
9 minimal. I mean, it's a heavy burden, but it's
10 not beyond all doubt basically because that
11 would be an impossibility. The law requires a
12 lot of proof, but it doesn't require the
13 impossible. If you weren't there to see it,
14 there are very few people who are ever going to
15 be absolutely one hundred percent certain.

16 A. True.

17 Q. But if that is your personal
18 requirement, you are entitled to tell us now.
19 Again, it goes back to that notion of a fair
20 trial. The defendant's rights are going to be
21 protected, but for the trial to be fair, I need
22 to have a chance going in. If I have got
23 somebody in that jury who requires one hundred
24 percent certainty, I have lost before we
25 start. So, where do you stand?

1 A. I don't know.

2 Q. I have to press you for an answer. I
3 need to know. You know. This isn't a crap
4 shoot. I need to know. You are the only one
5 who can look in your heart and tell me how you
6 feel about that.

7 MR. STAFFORD: Your Honor, I object to
8 the prosecutor trying to pin him down. I think
9 the proper inquiry would be could he follow the
10 court's instruction and the definition of
11 reasonable doubt and base his decision thereon.

12 THE COURT: It's overruled.

13 A. I guess I could follow them rules. I
14 could go with the reasonable doubt.

15 Q. Do you feel sure about that?

16 A. I am sure but not absolutely sure.

17 Q. Do you understand where I am coming
18 from?

19 A. Uh-huh.

20 Q. You know, I think -- I just want to be
21 sure you are going to give me a fair shot at
22 this. Do you feel like you can be?

23 A. Uh-huh.

24 Q. At this point, the oath is just to
25 tell the truth. People who serve on the jury

1 will take that second oath to base a verdict on
2 the law. The judge is going to tell you the
3 law, the legal standard is beyond a reasonable
4 doubt. You will be taking an oath to follow
5 that. So this is kind of like a fail-safe
6 period. People have a chance to say I disagree
7 with the law, I am not going to be in the
8 position of taking an oath to do something I
9 know I can't do. That is one of the main
10 reasons we have this individual questioning, to
11 give you a chance to tell us that if that is the
12 way you feel. Do you think you can follow
13 beyond a reasonable doubt?

14 A. Uh-huh.

15 Q. Yesterday talked about intent. I have
16 to prove that there were two intentional
17 murders. And I suggested -- I think I gave an
18 example of somebody cutting somebody off on the
19 freeway, kind of the spur-of-the-moment killing
20 but somebody intentionally killed, they get mad,
21 they pull a gun, they aim, they fire. I
22 suggested that the intent to kill can be formed
23 very quickly. Do you have any disagreement with
24 that?

25 A. No.

1 Q. How do you feel about this? If
2 somebody intentionally takes another person's
3 life, spur-of-the-moment decision, intentional
4 killing, is that less serious to your way of
5 thinking than somebody who takes somebody's
6 life, say a gun to the head?

7 A. I don't think it's less serious. I
8 don't think anybody should take anybody's life,
9 but it happens.

10 Q. Okay.

11 A. I think anybody that takes somebody's
12 life, it's serious. Very serious. Whether it
13 be one, two, three or four, it's serious.

14 Q. One of the things we didn't touch on
15 yesterday was talking about self-defense. Do
16 you feel like you have the right to defend
17 yourself?

18 A. Yes.

19 Q. And others?

20 A. Yes.

21 Q. Your family, your home, even your
22 property in some circumstances. Do you feel
23 that way?

24 A. Yes.

25 Q. The law certainly allows that. There

1 are limitations on the right to self-defense.
2 You certainly are not entitled, or the
3 limitation would include that you can use force
4 to a reasonable degree. In other words, the
5 amount of force that is necessary in the
6 circumstances, that is immediately necessary.
7 And you need to be acting lawfully. Let's use
8 an example to try to get into talking about
9 self-defense a little bit. I am going to try
10 to get your feelings a bit. Let's use the
11 hypothetical, say two guys are working late.
12 They stayed after hours working at the office.
13 Office is closed for the night. There is a sign
14 on the door that says open eight to five, Monday
15 through Friday. They didn't bother to lock the
16 door. They are in a back office doing their
17 work. All of a sudden they hear a noise out in
18 the front office. Joe, first guy in the back,
19 he is going to go check on that noise. He goes
20 out front. He encounters a burglar who is in
21 there going through the desk drawers looking for
22 petty cash. Joe lets out a yell. Mike, who is
23 still in the back, comes out. He thinks: Oh
24 dear, there may be trouble. He grabs something
25 to try to protect himself. They play baseball

1 after work a couple of nights a week, so there
2 is a baseball bat there, he grabs the bat, runs
3 out and encounters his co-worker friend Joe
4 struggling with this burglar. Mike runs out
5 with the baseball bat, burglar wrestles the
6 baseball bat away from Mike and uses it, beats
7 him in the head, kills him. Comes time for
8 trial, burglar says: Hey, it was self-defense.
9 I had to protect myself. That guy came after
10 me with a baseball bat. What do you think
11 about that?

12 A. Well, it is self-defense because the
13 guy did come after him with a baseball bat; but,
14 on the other hand, he was trying to protect his
15 friend.

16 Q. That's right. Do you feel like Mike
17 had the right to defend himself under those
18 circumstances and his friend?

19 A. Yes.

20 Q. Well, see, for most of us, and my
21 interpretation of the law is, first off, the
22 burglar -- the person who had the right to claim
23 self-defense would be Mike, not the burglar.

24 A. True.

25 Q. Because Mike is acting lawfully. He

1 is where he is supposed to be. He is protecting
2 his friend, his workplace. Burglar has no right
3 to claim self-defense when he is acting
4 unlawfully to begin with. Does that make
5 sense?

6 A. Yeah.

7 Q. You know, the limitation, the
8 restrictions on the right to defend yourself,
9 you can only use the amount of force that is
10 immediately necessary; and if a reasonable
11 person would retreat in that situation, they
12 must do so. So, in that kind of situation, I
13 mean, I feel like you would expect the burglar
14 to be the one to retreat, to run away. After
15 all, Joe and Mike were where they have a right
16 to be; right?

17 A. --.

18 Q. Or no? How do you feel about that?

19 A. You are right.

20 Q. What about the idea, you know, they
21 didn't bother to lock that door. Do you think
22 that made it okay for the burglar to come
23 inside?

24 A. No.

25 Q. What about if you were in a hurry this

1 morning to come down here and left your front
2 door unlocked or even ajar, didn't close it
3 good, does that mean it's okay for others to go
4 into your house in your absence?

5 A. No, it's not.

6 Q. Do you think a reasonable person would
7 think it was okay to go into your house?

8 A. No, I don't think so.

9 Q. You know, this is a two stage trial.
10 The first stage is guilt. The only evidence you
11 hear at that stage of trial surrounds the
12 capital murder offense that is on trial. Just
13 that offense. Again, it's a notion of fairness
14 in the law. A person should be tried for this
15 particular offense, not because they did
16 something bad in the past or whatever. So the
17 judge limits the evidence that is admissible at
18 that first stage of trial. You will hear all
19 the evidence, both sides will argue the case,
20 the judge gives the jury instruction, you go
21 back in the back and deliberate. Now, nobody
22 expects an immediate unanimous verdict. It
23 takes time. Deliberation means just that. All
24 the jurors talk, they think about, compare their
25 opinions, think through the evidence;

1 ultimately, after they have conferred with one
2 another, hopefully, they do come up with a
3 unanimous verdict. It's only after a jury has
4 come back with that verdict of guilty of capital
5 murder that you get to that second stage of
6 trial where you address those two questions.
7 Now, at the second stage of trial, then the jury
8 will come out and they hear more evidence,
9 maybe, if there is more evidence. Sometimes the
10 only evidence you have to consider at that
11 second stage of trial is the same evidence you
12 hear, I mean we don't put it on again, but you
13 still consider all that evidence you heard the
14 first time about the facts surrounding the
15 capital murder. There are times that I would be
16 asking a jury to answer those questions yes, no,
17 in other words, result in the death penalty,
18 based just on the facts of the capital murder
19 itself. Can you see that some capital murders
20 may be so bad that that alone would be enough to
21 justify answering those questions?

22 A. Yes.

23 Q. Even though it may result in the death
24 penalty?

25 A. Uh-huh.

1 Q. Other times you may have additional
2 evidence. Now, again, the burden never shifts.
3 It's always on the State. Defense can bring
4 evidence if they want to. They have the same
5 subpoena power the State does. They just don't
6 have to use it unless they choose to. At that
7 second stage of trial, the judge will let in a
8 lot of other types of evidence, anything that
9 either side offers that they think might assist
10 the jury. It could be evidence about a past
11 criminal history. On the other hand, they might
12 bring you something that says what a
13 hard-working, church-going, good member of the
14 community this person is, never been in trouble
15 before. It could be, what, background
16 information. Typical kind of thing might be for
17 a psychologist or psychiatrist to come in for
18 the defense and testify about this person's
19 background, what makes them tick kind of thing.
20 Maybe what we refer to as mitigating evidence.
21 Do you know any psychologists or psychiatrists
22 or had any dealings with them, know anything
23 about that field?

24 A. No.

25 Q. Do you have any strong feelings about

1 how reliable that type of testimony might be?

2 A. No.

3 Q. Do you feel like you would treat that
4 kind of an expert any differently than any other
5 witness?

6 A. No.

7 Q. At that second stage of trial, the
8 first -- you are going to consider all the
9 evidence, original offense, anything else we
10 bring you. First you look at that first
11 question. This is the one that talks about
12 whether there is a continuing threat to
13 society. Talks about probability. Is there a
14 probability that the defendant would commit
15 criminal acts of violence that would constitute
16 a continuing threat to society. Some people
17 look at that and they think that is kind of
18 crystal ball gazing, there is no way you could
19 ever be sure enough about the future to answer
20 that question yes.

21 A. That's true. You can't.

22 Q. Can't be sure about the future.

23 A. True.

24 Q. Okay. Could you never answer that
25 question yes?

1 A. I don't know. Possible.

2 Q. Talks about probability, not
3 certainty, because you couldn't be certain about
4 the future. Do you think that a person's past
5 conduct is any indicator of how they might
6 behave in the future?

7 A. Possibility. They might change. You
8 don't know.

9 Q. Some people do, some people don't?

10 A. True.

11 Q. In your mind, is there any particular
12 kind of evidence that, things might help you to
13 answer that question? Do you think a past
14 criminal history would be of any significance at
15 all?

16 A. Might be. I really couldn't say.

17 Q. Do you think the offense that was
18 committed would be helpful, the kind of capital
19 murder?

20 A. I am not sure.

21 Q. Can you see yourself ever able to
22 answer that question yes?

23 MR. STAFFORD: Has been asked and
24 answered, Your Honor.

25 THE COURT: Overruled.

1 MR. STAFFORD: I would ask that it be
2 phrased if he believes it should be answered yes
3 beyond a reasonable doubt.

4 THE COURT: These aren't trick
5 questions.

6 MS. DAVIES: They really aren't. I
7 mean, beyond a reasonable doubt is right there
8 in the question.

9 THE COURT: They are not going to ever
10 be allowed to pin you down on a set of facts.
11 I am not going to let them tell you what they
12 anticipate the facts are going to be in this
13 case, so they are having to ask you all of these
14 things in a vacuum, these never, neverland
15 hypotheticals. And the first thing I have got
16 to know is: If you believe the State has proven
17 the defendant's guilt beyond a reasonable doubt
18 of a capital murder offense, can you vote guilty
19 knowing that the only punishments are life and
20 death?

21 A. Yes.

22 THE COURT: And then the next thing is
23 if you found somebody guilty of capital murder
24 can you answer those questions without -- the
25 way I phrased it earlier was trying to make sure

1 you are not predisposed to answer things a
2 certain way just to make sure someone gets a
3 life sentence or answer a certain way just so
4 somebody gets the death penalty, but actually
5 look, examine, I mean, not just look at but
6 carefully consider and in your own mind make up
7 for yourself whether or not, number one, they
8 have proven to your satisfaction beyond a
9 reasonable doubt because it's still the State's
10 burden in question number one to prove there is
11 a probability, not a certainty but a
12 probability, more likely than not that the
13 defendant you have already found guilty of
14 capital murder and you might have heard some
15 additional information about would commit
16 criminal acts of violence constituting a
17 continuing threat to society.

18 Do you believe there is ever a set of
19 circumstances out there where you would be able
20 to find that there is such a probability that
21 defendant you just heard about would commit
22 criminal acts of violence constituting a
23 continuing threat to society?

24 A. Yes.

25 THE COURT: If you believe there was,

1 could you vote that way?

2 A. Yes.

3 THE COURT: On number two -- I'm
4 sorry. I am taking it away from you guys
5 again. Rattling on. You can have it again, Ms.
6 Davies.

7 BY MS. DAVIES:

8 Q. Okay. If you were on a jury -- and I
9 think you just told the judge that you can see
10 there may be a set of facts that you could
11 answer that first question yes?

12 A. Yes.

13 Q. Even though you knew that was one step
14 on the way to the death penalty; right?

15 A. Yes.

16 Q. If you had done that, then you would
17 look at the second question. And this time
18 again you are going to consider all the
19 evidence, the facts of the offense plus any
20 mitigating evidence that might be there. The
21 question here -- that is a long question. And I
22 think it gets, because it's so wordy, it gets
23 complicated. Basically what it is saying is
24 look at any mitigating evidence that is there,
25 also look at the facts of the offense and you

1 see how they weigh out, is the mitigating stuff
2 sufficient to outweigh the danger that this
3 person is to society and to outweigh the crime
4 they have committed, is it sufficient that you
5 think this person should get life instead of
6 death. If you say no, it's not sufficient, he
7 gets the death penalty.

8 A. I understand that.

9 Q. Okay. Can you see yourself ever able
10 to look at evidence and conclude that, yeah,
11 there may be something mitigating but I don't
12 think it's sufficient, I think the answer should
13 be no?

14 A. Yes.

15 Q. Do you have any questions for me?

16 A. No.

17 MS. DAVIES: Thank you. I pass.
18
19
20
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25

EXAMINATION BY THE DEFENSE

BY MR. STAFFORD:

Q. Mr. Sheehan, I am James Stafford, as you heard earlier. I often say I have the honor of trying to save my client's life because it has been known that the State is seeking the death penalty in this case. So, I think it's an honor to have the privilege of trying to defend someone to save his life. I apologize to you because I realize you have never had to do this before, and it's kind of an invasion of your privacy for us to ask you so many personal questions. We are not doing it to be mean to you or to be rude to you, it's to help us make this monumental decision of whether or not you are a fit juror to sit on this case.

A. I understand that.

Q. You understand what I am trying to do?

A. Yes.

Q. And I get -- I am sure from your job being on the road for so many hours and dealing with so many people, you have a tendency of probably watching them as they are boarding to kind of get a visual impression of what kind of people and what kind of passengers they are

1 going to be and whether they are going to give
2 you trouble or going to be talkers, or you get
3 these mental images of people. Sometimes you
4 are right. And the older you get I think we
5 conclude we are more right than wrong. But I
6 see you somewhat as a sensitive person and
7 compassionate person, but I am wondering that if
8 you are sitting on this jury, because from the
9 questionnaire I couldn't really -- you left
10 blank on my sheet the one through five as to --

11 MR. STAFFORD: Can I approach the
12 juror, Your Honor?

13 THE COURT: Yes, sir.

14 BY MR. STAFFORD:

15 Q. As to which one of these you would
16 have checked if you had to choose one.

17 A. Number three.

18 Q. Okay. I think some of the questions
19 that Ms. Davies asked you I would like to kind
20 of follow up on. Like I think you realize that
21 there are probably -- you stated that all murder
22 cases are serious.

23 A. Yes.

24 Q. And our law understands that, but one
25 of the luxuries as a juror if you are on this

1 case is, for example, we know that just because
2 I commit the offense of capital murder does not
3 necessarily mean that I deserve to die. Jurors
4 have the luxury of evaluating whether this is
5 the type of case where I went out and did
6 ritualistic carvings or whether it's a type of
7 case, using her hypothet, where I went into the
8 building maybe to burglarize the building, with
9 no weapons, thinking that no one was there, the
10 homeowner, I mean, the shop owner attacked me
11 and I was defending my life and took his life.
12 That is not justified. That is capital
13 murder. But that is something that you could
14 take possibly, if you thought it was, as
15 mitigating to determine whether that warranted
16 life imprisonment. Those are the type of
17 things that you could take into consideration
18 and consider. You understand that would be your
19 role?

20 A. Yes.

21 Q. If you are on this jury and if a
22 psychologist testifies, the fact that he gets
23 paid for his services to come here to testify,
24 would that offend you in any way?

25 A. No.

1 Q. I think everybody likes to be paid for
2 what they do.

3 A. True.

4 MR. STAFFORD: I have no other
5 questions, judge.

6 THE COURT: Why don't you step outside
7 this door right here?

8 (The prospective juror leaves the
9 courtroom).

10 MR. STAFFORD: I do not exercise a
11 strike.

12 THE COURT: It's my understanding for
13 the record that the defense is not exercising a
14 strike on this juror.

15 Is that correct, Mr. Stafford?

16 MR. STAFFORD: That is correct.

17 THE COURT: It appears Mr. Sheehan is
18 going to be our first alternate.

19 Would you bring him in, please?

20 (The prospective juror returns to the
21 courtroom).

22 THE COURT: Mr. Sheehan, you have been
23 selected.

24 THE JUROR: Thank you.

25 (Juror sworn)

1 THE COURT: In a minute, she is going
2 to give you two pieces of paper. One of them
3 is going to tell you to be back here on Monday,
4 September 28th at 10:00 a.m. to start trial. We
5 are also going to give you a badge. You are to
6 wear it at chest pocket level at all times when
7 you are in and around the courthouse from the
8 time you get out of your vehicle in the morning
9 until you get back in it in the afternoon. It
10 identifies you as a juror, and we are not going
11 to be discussing cases in front of you. The
12 attorneys involved in this case are being
13 instructed not to engage you in conversation.
14 If anybody attempts to talk to you about this
15 case, bring it to our attention immediately.
16 There's phone numbers on there and on the badge
17 also. You can contact me or the bailiff or the
18 clerk. I don't anticipate that is going to
19 happen. I don't anticipate there is going to
20 be any publicity, newspaper, television,
21 hopefully, before we begin testimony in this
22 case. If there is, it's usually only of the
23 nature that jury selection is concluded, the
24 case is going to begin on a certain day. If you
25 should see anything about this case or what you

1 think is this case, don't pay any attention to
2 it, change the channel, station, don't read
3 it. Don't make any kind of independent
4 investigation. Don't attempt to read any law
5 you think might apply in this case. Don't
6 attempt to find out what capital murder case we
7 are going to be trying. When you come down here
8 starting on Monday, the 28th, park where you
9 keep your car keys. I don't care where you park
10 as long as you keep your car keys during the
11 day. You work for Greyhound?

12 A. Yes, sir.

13 THE COURT: You have to tell them that
14 you have been selected. It's not definite as
15 to how many days you are going to be down here
16 starting September 28th. It could be as much as
17 two weeks. When you tell people that you are
18 selected to serve on a capital murder case,
19 don't hang around and let them impart
20 misinformation to you like people usually do.

21 Any requested admonitions, Ms. Davies?

22 MS. DAVIES: I think you have covered
23 it all.

24 THE COURT: Ms. Kaiser, any requested
25 admonitions?

1 MS. KAISER: Nothing further.

2 THE COURT: Do you have any questions
3 of me?

4 A. No, sir.

5 THE COURT: 28th, that is a Monday.
6 We are going to be in our courtroom up on the
7 8th floor.

8 Also we want you to wait out in the
9 hallway. Be wearing your badge and wait out in
10 the hallway, and we will come out and get you,
11 round up everybody that is out there wearing the
12 appropriate yellow badge and take you in a group
13 to the jury deliberation room. Okay?

14 A. Yes, sir.

15 (The juror leaves the courtroom).

16 MS. DAVIES: I want to be sure that
17 the record reflects that at this point the State
18 has used a total of fourteen strikes. Thirteen
19 of those were during the original proceedings of
20 selecting twelve jurors. The fourteenth strike
21 was on an alternate. And of those total of
22 fourteen strikes, twelve of them, the twelve
23 individuals who the State struck were white.

24 THE COURT: That is correct.

25 MS. DAVIES: I don't think the record

1 reflected that. I wanted it to reflect that.

2 MARIAN SCOTT,
3 called as a prospective juror, was examined as
4 follows:

5 EXAMINATION BY THE COURT.

6 Q. This is prospective juror number
7 thirteen on panel number six, Ms. Marian Scott.

8 Which school are you a counselor at?

9 A. Seabrook High School. It's Clear
10 Creek District. It's in Friendswood. That is
11 the mailing address.

12 Q. When you lived in Kingsville, that is
13 when you were at A & I?

14 A. Yes.

15 Q. Is your daughter an accountant?

16 A. Yes.

17 Q. What is the youngest one studying?

18 A. Mechanical engineering.

19 Q. Freshman this year?

20 A. Yes.

21 Q. You've served on a criminal jury but
22 it's evidently been sometime ago and it was a
23 misdemeanor offense?

24 A. It was in El Lago, and it was at
25 night.

1 Q. Traffic case or simple assault?

2 A. Yeah, I think it was simple assault.
3 Everybody was drunk.

4 Q. Did you live in El Lago?

5 A. Yes. Seabrook is my mailing address.

6 Q. Used to have a lot of traffic cases in
7 El Lago. Subsidized the city coffers, I think.

8 There is a couple of questions asking
9 about psychiatrists and psychologists. One is
10 have you or anyone in your immediate family ever
11 been under a doctor's care for any mental
12 illness, and the other is has any member
13 consulted a psychiatrist or psychologist. Can
14 you tell me who and what was the nature of that?

15 A. Many years ago, when my mother was
16 alive, she consulted one for alcoholism, and
17 more recently I took my son to a psychiatrist
18 for depression.

19 Q. Your youngest child?

20 A. Yes.

21 Q. You said to a psychiatrist?

22 A. For depression, or I perceived that he
23 was depressed. Psychiatrist saw him and said he
24 was fine.

25 Q. Said you are wrong, he is okay. How

1 old was he at the time?

2 A. Seventeen.

3 Q. So your son was able to say I told you
4 so?

5 A. He said, "Okay, Mom?" I said, "Okay."

6 Q. What is "Little House on the Freeway"
7 about?

8 A. It's a book about the hurried family
9 today. It's a contrast to the "Little House on
10 the Prairie". It's how to slow down. It's
11 very good. I recommend it.

12 Q. Did you find out about it through
13 counseling?

14 A. I am going to a program at our church
15 on the hurried family.

16 Q. Okay. Was that just yesterday we
17 talked to you?

18 A. Yes.

19 Q. We had a long night. We were here
20 until nine last night. There are some I don't
21 know if we call them conflicts or
22 inconsistencies on pages eight and nine of the
23 long form that I need to get clear.

24 A. Okay.

25 Q. On one page it asks you to check a

1 statement which best summarizes your general
2 views about capital punishment, and on the other
3 page it asks you to check whether or not you
4 agree or disagree with certain statements. I
5 know that we have you fill these out long before
6 we ever talk to you and tell you some general
7 information and general concepts and what it is
8 we are going about doing in this case. You had
9 checked on question 61 I am neither generally
10 opposed to nor generally in favor of capital
11 punishment. And from the next page your opinion
12 seemed to go from capital punishment gives the
13 criminal what he deserves to execution of
14 criminals is a disgrace. We must have capital
15 punishment for some crimes, wish it weren't
16 necessary but believe it's necessary. And had
17 checked the box I cannot vote to assess the
18 death penalty under any circumstances. Help me
19 out. Tell me what you believe.

20 A. Mentally or?

21 Q. Philosophically.

22 A. Philosophically, no.

23 Q. Philosophically you are opposed to the
24 death penalty?

25 A. Yes. Because, well, I am not opposed

1 to the death penalty. I personally could not
2 condemn someone to die.

3 Q. Okay. Page ten you actually had
4 written, "I don't feel qualified to judge
5 another person." Is this personal or
6 philosophical or religious?

7 A. Religious probably.

8 Q. Or combination?

9 A. Comes from my religious background.

10 Q. I know the participants in this case
11 fairly well, and I think I can tell you that you
12 should anticipate -- I am going to skip over a
13 whole lot of this stuff right now -- you should
14 anticipate that at some point, if you are
15 selected to serve on this jury, this lady over
16 here is going to be asking the jury to return a
17 verdict of guilty of capital murder. If a
18 verdict of guilty of capital murder is returned,
19 there is only two possible punishments, life
20 sentence or the death penalty.

21 A. Right.

22 Q. I feel it's fairly certain that you
23 should anticipate that this side of the table,
24 the defense, is going to be asking you to either
25 find the defendant not guilty or not guilty of a

1 capital murder offense and guilty of some lesser
2 offense. Now, I notice you have sat on a jury,
3 though it might have been a class C misdemeanor
4 offense, sometime in the past.

5 A. Yes.

6 Q. Are you telling me that you could
7 never sit on a jury in which the death penalty
8 is a possibility?

9 A. No, I didn't say that. I said I, when
10 it came down to--

11 Q. It's the penalty part you have problem
12 with?

13 A. Yes, that is what I have problem with.

14 Q. All right. So you believe that if
15 they prove to your satisfaction beyond a
16 reasonable doubt that the defendant was guilty
17 of capital murder you could vote guilty of
18 capital murder knowing that there is only those
19 two possibilities; right?

20 A. Uh-huh.

21 Q. But when it came down to answering
22 those special issues which determine whether I
23 am going to assess the death penalty or not, you
24 would always answer in a way that the death
25 penalty was not imposed?

1 A. I have never been acquainted with this
2 before, and yesterday I spent a lot of time
3 thinking about it. And I don't know. As I
4 say, I could not do it. I don't perceive I
5 would be doing it but that you would be doing
6 it, but that I would be giving you permission to
7 do it. I have a lot of trouble with that.

8 Q. There is a little bit of insulation
9 here, you don't have to go back and vote for the
10 death penalty, but you know if you vote yes on
11 one and no on the other one and it's unanimous
12 it happens. As sure as night follows day, I am
13 going to be assessing the death penalty.

14 A. Right.

15 Q. That is what I need to know, if you
16 can answer those questions, if the evidence was
17 presented to you and number one was proven to
18 your satisfaction beyond a reasonable doubt that
19 there is a probability that the defendant on
20 trial would commit criminal acts of violence
21 constituting a continuing threat to society, you
22 believe that had been proven beyond a reasonable
23 doubt, if you could vote yes on that one, and if
24 you didn't think there were mitigating
25 circumstances to warrant life imprisonment being

1 imposed, could you vote no on the other one?

2 A. I don't know. I have a real hard time
3 with that.

4 Q. No one ever knows until you actually
5 have to face it. They are entitled to answers
6 on these.

7 A. I know that.

8 Q. It's a very serious situation.

9 A. I realize that.

10 Q. They don't want to go into a trial,
11 particularly when it takes as long as this one
12 does, as long as the process does, knowing they
13 don't stand a chance.

14 A. I spent a long time prior to this
15 dealing with taking a life, whether it be
16 abortion, what have you. I have a real hard
17 time taking a life. To me, that would be taking
18 a life. I have spent half my life with the
19 idea that you don't take another person's life.

20 Q. It's okay to feel that way, but we
21 have to know.

22 A. And I do feel that way.

23 Q. You can be assured, if the jury finds
24 the defendant guilty of capital murder, Ms. Davies
25 is going to be asking that number one be

1 answered yes and number two be answered no.

2 A. I realize that.

3 Q. And I want to know if you come in with
4 preconceived notion as to how those answers
5 should be, or are you always predisposed to
6 answer certain way to insure that the death
7 penalty doesn't result?

8 A. I think I would be predisposed.

9 THE COURT: Why don't y'all approach
10 the side over here?

11 (Off the record bench conference).

12 THE COURT: It's my understanding by
13 agreement of all parties concerned prospective
14 juror number thirteen on panel number six, Ms.
15 Marian Scott, is being excused.

16 Is that your agreement, Ms. Davies?

17 MS. DAVIES: Yes, sir.

18 THE COURT: Yours, Ms. Kaiser?

19 MS. KAISER: That is correct.

20 THE COURT: Yours, Mr. Rhoades?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You are excused.

23

24

25

1 TODD BRATTON,
2 called as a prospective juror, was examined as
3 follows:

4 EXAMINATION BY THE COURT.

5 Q. This is prospective juror number
6 fifteen on panel number six, Mr. Todd Bratton.

7 It's a long drive from Kingwood to
8 Waller.

9 A. You are right.

10 Q. Are you going to change the house or
11 change the job?

12 A. Well, you know, I have a wife and two
13 kids that don't want to move, so I imagine I
14 will keep driving.

15 Q. I guess you have to go back and forth
16 on 1960?

17 A. Well, actually I go 2920 across and
18 also the toll road. I go both ways.

19 Q. Galveston-Houston company, is that the
20 same that used to build offshore oil living
21 quarters?

22 A. We own the company, yeah. At one
23 time.

24 Q. They made them over there off of
25 Channelview?

1 A. Yes. La Porte was the name.

2 G. H. La Porte Company.

3 Q. Two children. One at TCU?

4 A. Right.

5 Q. Studying what?

6 A. It's a good question. Some type of
7 marketing. And that is changing. So. I am not
8 sure, but she is in school.

9 Q. At the University of Arkansas, your
10 degree, you had a BSIM. What's the IM?

11 A. Industrial Management.

12 Q. How long were you in Vietnam?

13 A. One year.

14 Q. I think I have seen The Firm as the
15 last book read in about half of the last ten or
16 so people. Amazing.

17 Pages eight and nine of our long form
18 questionnaire either list statements and ask you
19 to check the one which best summarizes your
20 general views about capital punishment or ask
21 you to check whether or not you agree or
22 disagree with statements. It appears you are
23 strongly in favor of capital punishment, you
24 wish it weren't necessary, it's basically wrong,
25 but we have to have it for some offenses.

1 Correct?

2 A. That is correct.

3 Q. When I am saying capital offense I am
4 talking about one for which the only punishment
5 is life or death if somebody is convicted.
6 There is a statement that says any person, man
7 or woman, young or old, who commits capital
8 murder should pay with his own life. You
9 understand the scheme that we have? If you find
10 somebody guilty of capital murder, there are
11 only two possible punishments, and you have to
12 answer certain special issues which determine
13 whether or not I assess the death penalty?

14 A. That is correct.

15 Q. So, some might interpret that as
16 saying that anybody who is convicted of capital
17 murder should automatically get the death
18 penalty.

19 A. Well, I wouldn't say automatically.
20 It would depend on the case and the
21 circumstances, but I still feel strongly that
22 the law is lenient with the crime that we have.
23 I think it doesn't make sense to me to put a guy
24 in prison for life and the taxpayers pick up
25 the, you know, enormous bill when a jury has

1 decided that they should spend life in prison.
2 I guess I am pretty strong advocate of capital
3 punishment.

4 Q. There is a statement which says
5 capital punishment is justified only for
6 premeditated murder. You understand, after
7 these people talked to you yesterday,
8 premeditation is not a part of it?

9 A. Right. I know now.

10 Q. There is another statement which says
11 capital punishment should be available for more
12 crimes than it is now. And you probably had no
13 idea about how many different kinds of crimes it
14 was available for when you answered this.

15 A. That is true.

16 Q. Have you ever served on a jury before?

17 A. No. I have been called several times
18 but never served.

19 Q. Have you ever been called and actually
20 gone through the process in a criminal case as
21 opposed to a civil case?

22 A. No, just civil.

23 Q. I want to make sure that you are
24 basically in agreement on the general
25 presumptions, some of them that we talked about

1 yesterday. A defendant in a criminal case is
2 not a little bit guilty as he sits in court; he
3 is presumed innocent. Do you agree?

4 A. I agree.

5 Q. State has the burden of proof. Their
6 burden is to prove the defendant's guilt beyond
7 a reasonable doubt. Agree?

8 A. Agree.

9 Q. The indictment in a criminal case is
10 no evidence of guilt. Agree?

11 A. Agree.

12 Q. If a defendant does not take the stand
13 and testify in his own behalf, that can not be
14 considered as any evidence of guilt whatsoever.

15 A. Agree.

16 Q. Let's talk about that distinction
17 between murder and capital murder. When I am
18 saying murder, I am talking about somebody who
19 intentionally or knowingly causes the death of
20 another individual. That is, for our purposes,
21 a first degree felony offense of murder. The
22 range of punishment is five to 99 years or
23 life. For something to be elevated to capital
24 murder status where the only possible punishment
25 is a life sentence or the death penalty, not a

1 term of years, it has to be intentional taking
2 of a life plus some other aggravating factor.
3 And I ran through about six different ways that
4 we do that under Texas law. Somebody murders a
5 peace officer or fireman acting in the lawful
6 discharge of an official duty and a person knows
7 he is a peace officer or fireman, that is a
8 capital murder offense. If somebody commits
9 murder for remuneration, promise of
10 remuneration, or employs another to commit a
11 murder for remuneration or the promise of
12 remuneration that is capital murder offense. If
13 somebody commits murder while escaping or
14 attempting to escape from a penal institution,
15 that is a capital murder offense. If somebody
16 while incarcerated in a penal institution
17 murders another person who is employed in the
18 operation of the penal institution, that is a
19 capital murder offense. If someone
20 intentionally commits a murder in the course of
21 committing or attempting to commit another
22 felony, kidnapping, burglary, robbery,
23 aggravated sexual assault, or arson, that is a
24 capital murder offense. That is the kind most
25 prospective jurors are most familiar with. And

1 the final category is where a person murders
2 more than one person in the same criminal
3 transaction, the multi murder situation. We
4 know from my having read the indictment to you
5 that the allegation in this case is that the
6 defendant murdered more than one person in the
7 same criminal transaction. So we have all those
8 different kinds of circumstances, murder plus
9 some other aggravating factor. Are all those
10 kinds of offenses offenses which you think on
11 conviction should result in either a sentence of
12 life or the death penalty?

13 A. Yes.

14 Q. Did you understand the concept of
15 lesser included offenses we talked about briefly
16 with you yesterday where you might receive a
17 charge to the effect that if you do not believe
18 the State had proven the defendant's guilt
19 beyond a reasonable doubt of the primary
20 offense, for example, capital murder, you might
21 be asked to next consider whether what he did,
22 if anything, was a lesser included offense, for
23 example, murder, a first degree felony,
24 voluntary manslaughter, a second degree, or
25 involuntary manslaughter, stair-stepping down

1 through the felonies like that?

2 A. Yes.

3 Q. In any criminal case, if a jury finds
4 a defendant guilty, there is a second stage of
5 trial. We will call it the penalty stage.
6 Additional evidence may be presented. Each side
7 has the opportunity to call additional
8 witnesses. They don't have to, they are not
9 required to, but they may. And that is the
10 stage where you normally hear about a
11 defendant's background or reputation, prior bad
12 acts, previous criminal convictions if they
13 exist, those kind of things which most jurors
14 would think would be helpful in deciding what
15 the appropriate penalty should be. In a capital
16 murder case, the jury has found a defendant
17 guilty of capital murder, we also have that
18 second stage of trial where each side has the
19 opportunity to call witnesses and present
20 additional evidence. They don't have to but
21 they may. They may even present what we refer
22 to as mitigating evidence. We will talk about
23 that in a minute. But you might hear perhaps
24 about a deprived background or drug dependency
25 or something like that. Just in hypothetical

1 terms. At any rate, you go back then and
2 reevaluate all the evidence you received in the
3 case in chief and the penalty stage and, instead
4 of voting for life or death, you have to answer
5 certain special issues, certain questions I
6 present to the jury. Did you know that is how
7 the capital murder trial went in that order,
8 instead of voting for life or death, answering
9 these questions instead?

10 A. I do now. I mean, since yesterday.

11 Q. Okay.

12 A. But previous to that, no, I did not.

13 Q. That is how it works. And depending
14 on how you answer those questions determines
15 whether or not I assess life in prison or the
16 death penalty. I am going to refer you over
17 here to the blackboard. Number one question
18 would ask whether there is a probability that
19 the defendant would commit criminal acts of
20 violence that would constitute a continuing
21 threat to society. This is the question where I
22 am asking the jury to make a determination of
23 the defendant's future dangerousness. I would
24 instruct the jury that they are to consider all
25 the evidence admitted at the guilt or innocence

1 stage and the punishment stage, including any
2 evidence of the defendant's background or
3 character or the circumstances of the offense
4 that militate for or mitigate against the
5 imposition of the death penalty. By
6 probability, in common usage, we mean more
7 likely to occur than not. That term society,
8 the last word in that question, is a term which
9 is not going to be defined for you, but we know
10 that it includes all of society, including
11 society within the penitentiary. Have you ever
12 thought about that before? Having never seen
13 these questions, there is no reason you should
14 have. Can you see how that would be
15 appropriate?

16 A. Yeah, I can see how it would be
17 appropriate. I don't necessarily agree with
18 it. I mean, those are the rules.

19 Q. You don't have to agree. But in
20 answering special issue number one, while I
21 don't instruct you, I am telling you that the
22 society within the penitentiary is included
23 within that term.

24 A. Yes.

25 Q. Could you evaluate it that way?

1 A. Yes.

2 Q. We ask you to answer that question yes
3 or no. Takes all twelve jurors agreeing
4 unanimously to return a yes answer on issue
5 number one. Ten or more can agree on a no
6 answer, in effect, there is no such
7 probability. If the answer is no, that is the
8 end of it as far as the jury is concerned. I
9 assess a life sentence. If the answer is yes,
10 there is a probability the defendant would
11 commit criminal acts of violence constituting a
12 continuing threat to society, I ask the jury to
13 answer that issue number two. In answering
14 number one, sometimes you have that information
15 about the background, reputation, those kind of
16 things before you. Sometimes you don't.
17 Sometimes in a capital murder case all the jury
18 has to evaluate is the circumstances surrounding
19 the commission of the capital murder offense.
20 Do you see that in some capital murder cases the
21 circumstances surrounding the commission of the
22 offense could be so horrible that a jury could
23 find, based on that alone, there would be a
24 probability that defendant would commit criminal
25 acts of violence constituting a continuing

1 threat to society?

2 A. Yes.

3 Q. If the jury has answered number one
4 yes, you proceed to number two, which is asking
5 whether, taking into consideration all the
6 evidence, including the circumstances of
7 offense, the defendant's character and
8 background and personal moral culpability of the
9 defendant, there is a sufficient mitigating
10 circumstance or circumstances to warrant that a
11 sentence of life imprisonment rather than a
12 death sentence be imposed. I would instruct you
13 that you are to consider mitigating evidence to
14 be evidence you might regard as reducing a
15 defendant's moral blameworthiness. Our statutes
16 do not set out for us, don't limit, give us any
17 definition of what exactly is mitigating
18 evidence. They don't tell us what circumstances
19 of the offense, what the defendant's background
20 is mitigating. The law does not impose any kind
21 of formula for determining how much weight to
22 give a mitigating circumstance in answering
23 issue number two. We ask the jury to answer
24 that yes or no. This time it takes all twelve
25 jurors agreeing unanimously to return a no

1 answer. Takes ten or more to agree for a yes
2 answer to be returned. A yes answer on number
3 two also results in the imposition of a life
4 sentence. Only if number two is unanimously
5 answered no after a unanimous yes on number one
6 do I assess the death penalty. A yes, no,
7 respectively, on one and two is the only way the
8 death penalty is imposed. You have the right to
9 know that in advance exactly what I am going to
10 do. You are insulated to some extent from
11 having to vote for life or death, but you get to
12 know exactly what I am going to do depending on
13 how you answer those two special issues. While
14 we don't have a list of the kinds of things that
15 are mitigating, whether it's twenty items long
16 or twenty thousand items long, in the
17 appropriate case, we know certain things are
18 mitigating. I do not know where you might get
19 mitigating evidence from. Sometimes it's
20 something you have heard in the State's case in
21 chief. You might have heard something through
22 one of their witnesses that you think is
23 mitigating circumstances. Oftentimes the
24 defense calls witnesses in the second stage of
25 trial, and you might hear evidence at that time

1 perhaps from family members or someone else
2 about some kind of deprived background, perhaps,
3 something you might consider to be mitigating.
4 Whatever it is, you determine how much weight to
5 give it. We know that mental retardation and
6 mental illness are mitigating circumstances. We
7 know that in the proper case mitigating evidence
8 can include such things as a defendant's good
9 behavior while in prison or in jail, an
10 exceptionally unhappy or unstable childhood,
11 childhood drug abuse, economic deprivation,
12 youth, a defendant's age, voluntary
13 intoxication, drug dependency, illiteracy,
14 opinion testimony of lay witnesses or
15 psychiatric opinion testimony that a defendant
16 would not be a danger in the future. Those and
17 many more things in the proper case could be
18 mitigating circumstances. Whatever it is, you
19 make the determination how much weight you are
20 going to give a circumstance. One juror might
21 give something like drug dependency very small
22 amount of weight and somebody might give it a
23 great deal of weight. Just depends on the jury
24 and how you weigh these different things you
25 might be hearing about. At any rate, do you see

1 how both number one and number two don't have
2 automatic answers, they are not automatically
3 yes or no, they are going to depend on the facts
4 and circumstances of each case you have to
5 evaluate?

6 A. Yes, I understand.

7 Q. I have to make sure you are not
8 predisposed to always answer a certain way
9 simply to insure that a death penalty results or
10 to insure that a life sentence results.

11 Is there anything about your views
12 regarding capital punishment or the death
13 penalty which would prevent or substantially
14 impair the performance of your duties as a juror
15 in accordance with the instructions I would give
16 you and your oath as a juror?

17 A. No, I don't think so.

18 THE COURT: Ms. Davis.

EXAMINATION BY THE STATE

BY MS. DAVIES:

Q. Hello again, Mr. Bratton.

A. Hi.

Q. I think I am understanding that what you are telling the judge pretty clearly here, combined with your questionnaire, that if I brought you the evidence to convince you beyond a reasonable doubt first that an individual is guilty and then that those questions should be answered yes and no that you could actually participate in the verdict that was going to result in the death penalty?

A. Yes.

Q. Has your attitude toward the death penalty been an opinion you have held for a long time, or has it changed at some point in your life?

A. I think I probably always had an opinion. It's probably stronger in the past couple of years just because of the crime that has developed over the past few years.

Q. Okay. At the same time, I think you have an appreciation for the concept, I mean, we are here, we have to be careful to protect the

1 defendant's rights, we need a fair trial, both
2 sides of the table. Of course that is why I am
3 very concerned to be sure you are a person that
4 if I bring you the evidence you could give the
5 death penalty. But the defense, of course, has
6 the other concern. So I want to be sure there,
7 too, that I am understanding that you are not
8 going to automatically always answer those
9 questions so as to result in the death penalty,
10 that it would just depend on the evidence in a
11 given case.

12 A. That is true, it would depend on the
13 evidence.

14 Q. Okay. So, am I understanding that
15 sometimes those questions, sometimes the
16 questions might go my way, sometimes they might
17 go the defense's way, depending on the evidence?

18 A. That is correct.

19 Q. There were a couple of things that you
20 had expressed concern about. And on your
21 questionnaire you said something about concern
22 about parole, early release. And yesterday the
23 judge had told you, I think I did, too, that he
24 is going to instruct you that you can't consider
25 that in reaching your verdict. Can you follow

1 that instruction?

2 A. I don't agree with it, but I can
3 follow it, yes.

4 Q. And that is really what we are needing
5 to know here.

6 A. Right.

7 Q. There are a few things -- like the
8 judge went down most of that list of the things
9 -- the right to remain silent and so forth, but
10 there were a couple of other things that were
11 sensitive that we want to be sure that you could
12 follow the law if you are on the jury because
13 that is what your oath is.

14 A. Right.

15 Q. I had mentioned the possibility
16 whenever a defendant's statement is offered into
17 evidence there is a possibility of the judge
18 telling the jury that they would consider the
19 evidence and decide whether that statement was
20 voluntary. And if they were not convinced that
21 it was voluntary, whether that may be because of
22 some blatant type of coercion or whether it may
23 be, for example, some rookie cop forgot to -- I
24 started to say cross his I's and dot his T's --
25 or maybe because he did cross his I's and dot

1 his T's -- it could be something that trivial.
2 If you weren't convinced it was voluntary, you
3 would have to disregard it, let the chips fall
4 where they may. The most difficult scenario is
5 where if you have gone through that mental
6 exercise of concluding you have to disregard the
7 statement and there is not enough other
8 evidence, that you would have to actually find
9 somebody not guilty even though you have heard a
10 statement that convinced you in your heart that
11 they were.

12 A. Yes, I understand.

13 Q. So we need to be sure you could follow
14 that aspect of the law also.

15 A. Yes, I could.

16 Q. Thank you. Were there any of the
17 things we talked about yesterday that you found
18 yourself in disagreement with, maybe you didn't
19 say anything but?

20 A. Well, I mean, where a jury awards a
21 life sentence, and which I have already stated,
22 the right of the governor or whoever to release
23 that person early. I don't agree with that.

24 Q. Okay. I think you have already said
25 you would not let that influence your verdict.

1 A. Right.

2 Q. Fair enough. Sometimes -- let me talk
3 about this, the phrase beyond a reasonable
4 doubt, you have heard us use that frequently.
5 Haven't really gotten into it in depth. The
6 burden of proof is always on me. That is true
7 at both stages of trial. You can never require
8 the defense to produce any evidence whatsoever.
9 That is my responsibility. They do have the
10 same subpoena power; they can bring evidence if
11 they choose to do so; but you must not require
12 that of them at either stage of trial. I have
13 to convince the jury of guilt and then at
14 punishment the answer to that first question
15 beyond a reasonable doubt. The instruction the
16 judge will give you about the standard of proof
17 makes clear that it is not beyond all doubt.
18 Because we are talking about the death penalty,
19 some jurors, their personal preference is they
20 require it. I need to be sure that beyond a
21 reasonable doubt would satisfy you, that you
22 would not hold me to some higher burden.

23 A. Yeah, I could do that.

24 Q. We talked a little bit yesterday about
25 intent. I suggested that one could form the

1 intent to kill very quickly. Do you have any
2 disagreement with that concept?

3 A. No, I think you can.

4 Q. One thing we didn't talk about was the
5 notion of self-defense. And that is something
6 that comes up in just about any murder case, or
7 certainly the idea, the concept, whether
8 factually it does or not. And the law
9 certainly includes that right of self-defense
10 within certain limitations. I assume that you
11 would agree with that aspect of the law?

12 A. Yes, I would.

13 Q. Sometimes the idea gets a little
14 garbled, though, when we get into different fact
15 situations. You probably hear examples of it on
16 the news on a daily basis. Hypothetically
17 speaking, you could have a situation where
18 somebody is working late at night, they are in
19 the back office, didn't bother to lock the front
20 door, although there is a sign on the door that
21 says the office closes at 5:00 and this is
22 obviously well after five. They are in the
23 back. Burglar comes in, is going through the
24 drawers for petty cash. Man in the back hears a
25 noise, grabs something heavy to protect himself

1 because that is all he has at hand. Say, for
2 whatever reason, there happens to be a baseball
3 bat laying around the office, grabs that to go
4 out to see what that noise is, confronts the
5 burglar, who proceeds to wrestle the baseball
6 bat out of the man's hands, beat him in the
7 head, kills him. Comes trial time, burglar
8 claims: Hey, it was self-defense, I had to
9 defend myself, that man came out with a baseball
10 bat. What is your reaction to that?

11 A. I think I would have a problem with
12 that.

13 Q. Well--

14 A. I mean, I think the guy is guilty. I
15 mean, he entered a private residence, and I
16 don't think he has -- I wouldn't think he would
17 have much defense.

18 Q. Well, and I would tend to agree with
19 you on that. I think, you know, when I say he
20 claimed self-defense, a person can say anything
21 they want to.

22 A. Right.

23 Q. They can claim anything they want
24 to. That doesn't mean they are legally
25 correct. Because the law gives the right of

1 self-defense to someone who is acting within the
2 law. So, for starters, I would say the burglar
3 in that hypothetical is not acting lawfully, to
4 begin with. So, the man who is working late
5 certainly has the right to defend himself in
6 those circumstances as long as the amount of
7 force that he uses is reasonable, the amount,
8 the degree that is immediately necessary, given
9 the situation. And the further requirement of
10 the law of self-defense is that a person retreat
11 if a reasonable person would do so under the
12 circumstances. My suggestion is in that kind of
13 situation the burglar is the one who should get
14 out of Dodge, not the person who is at home or
15 in their own office.

16 A. Right.

17 Q. I just wanted to be sure that you feel
18 like that a person does have the right to, I
19 mean, some people feel like if I was in a
20 situation like that I would hide under the
21 desk. Others are braver and they would try to
22 protect themselves. Do you feel like a person
23 has the right to fight for their life if they
24 are in that situation?

25 A. If you are the burglar?

1 Q. No, really I was thinking in terms
2 of--

3 A. Yes, I think a person has the right to
4 defend himself.

5 Q. Okay. Two stage trial. The first
6 stage of trial, as a rule, the evidence, well,
7 always the evidence is limited to the facts
8 surrounding the capital murder itself. Idea
9 being you stand trial for this offense, not for
10 past wrongdoings. So that is all the evidence
11 the judge is going to let the jury hear at that
12 stage. After they have heard the evidence,
13 heard the lawyers' arguments and the judge's
14 instructions, the jury deliberates, discusses
15 the evidence, confers with one another, reaches
16 a verdict. It's only after the jury reaches a
17 verdict of guilty of capital murder that they
18 then return to the courtroom to hear evidence at
19 that second stage of trial and deal with those
20 other two questions. Now, sometimes there is no
21 additional evidence. Sometimes I would be
22 asking the jury to answer those questions to
23 result in the death penalty based just on the
24 facts of that particular capital murder. Can
25 you see that there may be some capital murders

1 that are bad enough in and of themselves to
2 justify the result being the death penalty?

3 A. Yes, I can.

4 Q. Other times you would have other
5 background information. Again, burden of proof
6 is always on me. Never can look to them to
7 produce any evidence. You could hear past
8 criminal history, or they might bring in good
9 stuff. This was a good guy, goes to church, has
10 a job, he takes care of his family. Or the
11 kinds of things that they refer to as
12 mitigating. Maybe had a deprived childhood, an
13 abused childhood, mentally ill or mentally
14 retarded, a drug addiction, whatever. At that
15 second stage of trial, the instruction is you
16 consider all the evidence, the facts of the
17 crime as well as anything that has been offered,
18 good, bad or indifferent. Certainly including
19 the mitigating. I think the important thing is
20 going to be for us to know that you would be the
21 kind of person who would keep an open mind and
22 would consider all the evidence, including the
23 mitigating. Is it fair to assume that whatever
24 evidence is there, I mean, I don't, well, let me
25 start all over.

1 Certainly can't ask you how you would
2 weigh any particular kind of evidence at this
3 point. I think you would have to have it in
4 context. Does it seem fair to think that one
5 mitigating factor, say it's because somebody is
6 addicted to drugs, it may weigh differently for
7 you in different cases. If somebody has
8 recently started using crack cocaine and is out,
9 you know, robbing to get the money for drugs and
10 robbing because they are on drugs, just an
11 endless cycle, that might be one scenario. On
12 the other hand, in another situation you could
13 have evidence that this person has a terrible
14 drug addiction because their mother put LSD in
15 their bottles when they were a baby. You know,
16 depending on the situation, sometimes it may
17 weigh very little; other times it may weigh a
18 lot. The concern is just to be sure that you
19 would consider what was there and give it the
20 weight that you thought was appropriate in the
21 particular case.

22 A. Yes, I think you would just have to
23 make a judgment, yes.

24 Q. Considering all the evidence, the
25 offense as well as whatever else is introduced.

1 When you look at that first question,
2 it talks about probability, not certainty but
3 probability. At the same time, it is looking
4 to the future. Some people feel like that that
5 is just crystal ball gazing, you could never be
6 sure enough to answer that question. How do you
7 feel?

8 A. I think it is probably guessing.
9 Really, I mean, I don't know, you just have to
10 look at the circumstances; but, you know, if he
11 has committed a crime once, a murder, I don't
12 really know, you know, without hearing the case,
13 whether, you know; but it doesn't seem like
14 that, I mean, it seems like he would be a, you
15 know, a threat to society.

16 Q. Well, anytime that you address either
17 one of those questions you are in the position
18 of having found somebody guilty of capital
19 murder. That is where you are. That is why,
20 you know, it's like from my side of the table I
21 want to be sure that you read that question and
22 you say yes, I can see that there may be times
23 that it would be appropriate to answer that
24 question yes, given the evidence.

25 A. Yes.

1 Q. And on the other hand, I know that,
2 when Mr. Stafford or Ms. Kaiser talk to you,
3 they are going to want to be darn sure they
4 don't have somebody sitting on that jury who
5 automatically answers it yes just because
6 they've found guilty of capital murder. They
7 are going to want an open-minded person who is
8 going to say yes or no depending on how that
9 evidence comes out at trial.

10 A. I think I would say yes or no, but I
11 think it would really have to be -- I don't know
12 what it would be, but I think it would have to
13 be some pretty strong evidence to convince me
14 that he would not, that a person would still not
15 be a threat to society if in fact he had been, I
16 mean, we had convicted him of capital murder. I
17 would try to be open-minded that -- yes, maybe
18 there are cases. Frankly, I can't think of any
19 right now.

20 Q. Well, and neither one of us are going
21 to put you on the spot to make you come up with
22 a particular one. But, you know, there may be
23 that one situation out there or two or three
24 where somebody is guilty of capital murder and,
25 yet, you think no. You know, well, for example,

1 in the capital murder context, the judge used an
2 example, when we were talking about murder, of a
3 mercy killing. I guess you could have a
4 situation where that was actually a capital
5 murder.

6 A. Right.

7 Q. You could have a situation where a
8 parent, say, has two children who were injured
9 in an automobile accident who have been lying on
10 life-support systems and their injuries, and
11 they have been there for months, the doctors are
12 telling them there is absolutely no hope of
13 recovery, and they are in pain and they can't
14 give them medication for pain, and a parent
15 finally can't stand it anymore, I have to put
16 these two kids out of their misery. It's
17 intentional.

18 A. Yeah.

19 Q. It's more than one death. It's
20 capital murder. But?

21 A. That would be an easy no for me.

22 Q. Yeah. You know. And there could be
23 others. You know, we all have pretty good
24 imaginations. That is why, you know, we come up
25 with hypotheticals that are bizarre sometimes,

1 but it's just to illustrate that in the universe
2 of fact situations we need to be sure that you
3 are not going to automatically answer that
4 question yes or no.

5 A. Right. I think I could do that.

6 Q. Okay. The judge touched on that term
7 society, and I want to touch it again. It's not
8 a legal definition, but the law makes clear that
9 it includes all aspects of society. I want to
10 be sure that you would keep an open mind in that
11 regard, too.

12 A. Yes.

13 Q. There are people in houses,
14 apartments, on the street, in prison, include
15 them all, not exclude anyone.

16 A. Yes.

17 Q. If a jury answers that first question
18 yes, then they would deal with the second
19 question. And this is where basically you
20 reweigh the evidence, decide whether the
21 mitigating circumstances rise to the level of
22 indicating to you that this person deserves a
23 life sentence instead of the death penalty.
24 It's a weighing test. And we talked about some
25 of the mitigating kind of factors a few minutes

1 ago. The drug addiction might weigh differently
2 in different cases. Would you also keep an open
3 mind to all of the mitigation that the defense
4 might bring, decide how to weigh it, once you
5 are in the jury room?

6 A. Yes, I could.

7 Q. In some situations might there be
8 mitigating evidence and even so you might not
9 think that it was sufficient to outweigh the
10 enormity of the crime so that you would answer
11 that question no?

12 A. Yes, I think there are.

13 Q. On the other hand, it may weigh--

14 A. Right.

15 Q. I know I am beating a dead horse
16 here. I just want to be sure that you are not
17 going to answer those questions automatically
18 either way.

19 Do you have any questions for me?

20 A. No.

21 MS. DAVIES: Thanks. I pass.

22

23

24

25

EXAMINATION BY THE DEFENSE

BY MS. KAISER:

Q. Good afternoon. We slid right from morning to afternoon.

A. Okay.

Q. My name is Deborah Kaiser. And you and I haven't had a chance to speak at all. I have been looking over your form. How are you involved with Little League?

A. I have a son that has played. Of course he is fifteen now.

Q. He is not involved anymore?

A. No, he played his last year this past year.

Q. Do you think you will still keep up with it?

A. No, probably not. I am going to retire.

Q. I sponsored my nephew's team the last several years and have gone from T-ball to the minors to majors. And how they develop is really interesting. And they tried to talk me into being team mom.

A. That is my wife's job.

Q. That is a thankless job. I saw, not

1 being a real mom, I saw what the real moms go
2 through. That is why they were trying to shove
3 it off on me. I was too wise to rise to the
4 bait, though, I said absolutely not.

5 Exactly what is GH Bettis?

6 A. GH stands for Galveston-Houston
7 Company. They are a public company, holding
8 company, and they have three subsidiaries, and
9 GH Bettis is a subsidiary. We manufacture
10 valve actuators. It's just a device that
11 automates a valve anywhere from a two inch valve
12 up to sixty inch diameter.

13 Q. So the Bettis part of that subsidiary
14 is located in Waller?

15 A. That's true, unfortunately.

16 Q. You have drawn the black bean on that
17 one?

18 A. Yeah.

19 Q. You are the president of that
20 subsidiary?

21 A. I am president of Bettis and I am also
22 an officer, senior vice-president in the
23 corporation, but I office at Waller.

24 Q. Your wife is no longer a school
25 teacher?

1 A. No, she retired. She taught five
2 years right after we were married, and she just.

3 Q. What level did she teach?

4 A. Third grade.

5 Q. Kingwood is a lovely area. How long
6 have y'all lived up there?

7 A. We have been there fourteen years.

8 Q. You understand that now is the time
9 for you to be able to fully express your
10 opinions and say I understand that is what the
11 law is and I disagree with it, and you can
12 either say I disagree with it but I can follow
13 the law or I disagree with it and I am going to
14 sit tough with my convictions, I disagree, and
15 the judicial system is just going to have to
16 work its way without me. That is your option at
17 this particular point in time. So I don't want
18 you to feel like anybody is trying to narrow you
19 down or shove you into their corner.

20 A. I understand.

21 Q. In listening to your responses to both
22 the judge and to Ms. Davies, obviously I am a
23 little concerned because you seem to be an
24 extremely strong supporter of capital
25 punishment. And probably, just like you

1 expressed, more so the last several years,
2 because of this crime wave that seems to have
3 overtaken us all, and I don't know that any of
4 us have gone untouched either by people we know
5 or family members or whatever, and that
6 certainly is not an unusual position nowadays or
7 an unusual reaction.

8 Do you read the newspaper fairly
9 regularly?

10 A. Yes.

11 Q. Are there times when you are reading
12 the newspaper or you are watching TV and, of
13 course, the reporters are always very concerned
14 about different capital murder trials that are
15 going on here in the courthouse, and,
16 unfortunately, there are always several going on
17 at the same time. Do you recall anytime that
18 you might have heard, kind of followed a case
19 along to its conclusion and the jury convicts
20 the defendant of capital murder and then come
21 back and gives them a life sentence? Do you
22 recall ever reading a story of that happening?

23 A. Not--

24 Q. I am not asking you to come up with
25 one out of your mind.

1 A. Not specifically. I mean, I guess I
2 would have to answer yes in general.

3 Q. Would you have a reaction if you had
4 read or heard that? I mean, would your reaction
5 be: What in the world! My God, I remember the
6 facts of this, how in the world could they give
7 him life?

8 A. I would say, yeah, I have had some
9 questions. I mean, of course, you don't know
10 all the detail, but what you read in the
11 newspaper, sometime you really wonder, you know,
12 how someone could get a life sentence.

13 Q. Would you think, that generally
14 speaking, once you had found someone guilty of
15 capital murder, once you had reached that point
16 where you had found that they had either killed
17 somebody in the course of sexually assaulting
18 them or killed two people in a criminal
19 transaction, once you had reached that point, do
20 you think that, because of your reactions and
21 your feelings and beliefs, you would be leaning
22 more towards favoring the death penalty for
23 punishment as opposed to a life sentence, or
24 would you just be right down the middle, or how
25 would you stand on something like that just

1 heading into it?

2 A. Heading into it, I would probably lean
3 toward capital punishment.

4 Q. So my job as defense lawyer would be
5 to kind of pull you back around, to present
6 certain evidence to bring you back into the main
7 line or over into my part of the graph?

8 A. That is correct.

9 Q. So, to phrase it another way, you
10 might be a little predisposed toward capital
11 punishment heading in; but then, once you start
12 hearing the evidence, then you may be swayed a
13 different direction; but just going in, just
14 after having convicted someone of capital
15 murder, you are probably leaning a little bit
16 more toward the death penalty as an appropriate
17 punishment?

18 A. That is correct.

19 Q. Well, let's go a step further. In
20 looking at issue number one, when you were
21 speaking with Ms. Davies about this and talking
22 about assessing the probability of whether or
23 not a person would commit criminal acts of
24 violence that would be a continuing threat to
25 society, what I think I heard you say -- and

1 tell me if I am wrong -- was that, of course,
2 you had already found that they had committed
3 this capital murder, so that in itself in your
4 mind may have been a continuing threat to
5 society, and then you would kind of look to the
6 defense to give you evidence or information that
7 would make you think that they would not be a
8 threat to society?

9 A. That is true. You know, for instance,
10 in the example she gave, I think they would not
11 be. And, I mean, there are instances, sure,
12 that they would not be a threat. But I think
13 it's, I mean, if a person has been found guilty
14 of murder, I mean, that is a tough judgment to
15 make, to turn them back to society. I mean,
16 that they won't be a threat to society at some
17 point.

18 Q. So, once again, and because we get so
19 wrapped up in legal terminology and magic words
20 and everything, in approaching question number
21 one, once you found somebody guilty of
22 committing a capital murder, what I am hearing
23 you say is that you would be predisposed to
24 thinking that they would be a continuing threat
25 to society absent other evidence from the

1 defense convincing you otherwise?

2 A. I would say that is true.

3 Q. The issue of parole is always a sticky
4 one because anybody that reads the papers or
5 watches the news or has half a brain, you can't
6 escape knowing or thinking that you know and
7 feeling like there are some severe inequities
8 that are going down with people only serving a
9 portion of their sentence. As you have been
10 told, the issue of parole is not something that
11 a juror is to consider. Now, granted, you can't
12 just flush your mind of whatever you might know
13 or think that you know, but you are not to give
14 it any effect or take it into consideration at
15 all in reaching your conclusion. But say, for
16 instance, you had found somebody guilty of
17 capital murder, you were on the punishment stage
18 of the trial and had been given evidence by the
19 state and by the defense regarding the two
20 special issues and you were sitting back in the
21 jury room and considering your responses to
22 these special issues, and you were kind of on a
23 bubble because you were having a tugging both
24 directions I guess, it didn't seem extremely
25 clear cut to you, and could you put the issue of

1 -- my fear is that some people might look at
2 that and say: Well, he might be okay with a
3 life sentence if I really thought he was going
4 to be in jail for life, but because I really
5 know what I know and what I have read in the
6 paper, I am going to go ahead and answer these
7 questions in a way that a death sentence would
8 result because I don't feel like he would
9 actually serve a life sentence in prison. Do
10 you think it's a possibility that those type of
11 thoughts might be going on in the back of your
12 mind if you were in that particular position?

13 A. Well, again, I don't agree with the
14 law, but I think I could make the judgment,
15 yeah, I think I could put it out of my mind. I
16 think you just weigh the death penalty and the
17 life sentence.

18 Q. So you could in a situation like that
19 go ahead and answer those questions in a manner
20 in which a life sentence would result even
21 though it was your fear that a life sentence
22 wouldn't be served, that wouldn't be a part of
23 your thought process at all?

24 A. I don't think so, no.

25 Q. If you were a criminal defense lawyer

1 and you were defending a fellow that had been
2 charged with capital murder and going through
3 the process like we are going through right now
4 and you were sitting here in this chair and
5 speaking with a fellow of similar beliefs and
6 like circumstances that you have, would you put
7 that person on the jury?

8 A. Yeah. I am a nice guy.

9 Q. Nice has nothing to do with it. If
10 you wanted to save your client's life and
11 knowing how you feel and your predisposition
12 toward certain things, once a person has been
13 convicted of capital murder, would you put a
14 person of similar thought processes on your
15 jury?

16 A. I would say yes. I mean, I think I
17 am a reasonable person and a reasonable
18 upstanding citizen that uses good judgment.
19 Yes. In the first place, I don't want to be a
20 lawyer, okay.

21 Q. Good. Everybody else does. When you
22 look at issue number two that deals with
23 mitigation evidence, let's just talk about
24 certain things. What are your general thoughts
25 about drug addiction? Can you ever foresee a

1 case in a proper case that evidence of drug
2 addiction might be a mitigating factor for you,
3 given whatever weight you want to give it?

4 A. I think I could where the addiction
5 that had probably developed up through, you
6 know, through the parents somehow.

7 Q. So, if it began involuntary?

8 A. Right.

9 Q. But a voluntary --

10 A. I think I would just have to consider
11 the circumstances. I think it would be more
12 difficult if it had been a, you know, someone
13 had been on drugs continuously and had a chance
14 to get off. I mean, it would be a more
15 difficult decision for me. I think really it
16 would depend on the specific circumstances.

17 Q. But outside of the situation where the
18 drug addiction began involuntary through the
19 mother putting LSD in the bottles or whatever
20 the hypothetical was, I would assume a very rare
21 situation. We are probably looking at more of a
22 voluntary drug situation in 99.9. And a
23 voluntary drug or alcohol abuse situation, in
24 those set of circumstances, in a proper case, do
25 you ever think you could consider that type of

1 evidence as mitigating?

2 A. I think there are cases, yes, that I
3 could, yes.

4 Q. How do you feel about -- what is your
5 reaction about people committing crimes and then
6 saying, well, I don't know why I did that, and
7 then you hear evidence of an extremely abusive
8 childhood and things where they might have
9 received some type of an emotional or mental
10 flaw early on in their years that somehow
11 appears to have resulted in a life of crime
12 later down the road? What is your immediate
13 reaction to hearing a story like that?

14 A. Well, I agree. I mean, I think that
15 happens in cases.

16 Q. Is evidence of that nature in a proper
17 case something that you might be able to
18 consider mitigating?

19 A. Yes.

20 Q. Let me back up just one minute and we
21 will let you get out of here. Back to issue
22 number one. When we were talking about the
23 continuing threat to society. I believe what
24 you have stated to me earlier is that by virtue
25 of the defendant having been found guilty of

1 committing a capital murder, which is a
2 horrible, unexcusable deed, that in approaching
3 issue number one you would already have thought
4 that he would be a continuing threat to society
5 and it would be incumbent upon the defense to
6 bring you evidence or information or somehow
7 sway you back to the belief that he would not be
8 a threat to society, that life imprisonment
9 might be an appropriate punishment for him.
10 Have I stated your position correctly?

11 A. Yes, I think so.

12 Q. Do you feel pretty strongly about
13 that?

14 A. Yes.

15 MS. KAISER: Your Honor, I would like
16 to make a motion outside the presence of the
17 juror.

18 MS. DAVIES: I am going to want to
19 have an opportunity to ask him some questions.

20 THE COURT: I know. You are making a
21 challenge?

22 MS. KAISER: Yes.

23 THE COURT: I want to ask you some
24 questions, too, about issue number one. You
25 don't get to issue number one until the jury has

1 already found someone guilty of capital murder
2 when you get those two special issues to answer.
3 We told you in the case in chief the burden of
4 proof is on the State to prove the defendant's
5 guilt beyond a reasonable doubt. Issue number
6 two doesn't carry a burden on it. If you read
7 it, there is no beyond a reasonable doubt
8 information in there. Issue number one does.
9 The burden of proof is on the State in issue
10 number one. I don't think anyone has explained
11 it in those terms to you. But that first line
12 -- do you find from the evidence beyond a
13 reasonable doubt. There are circumstances of
14 the offense, whatever it took for the jury to
15 find the defendant guilty of capital murder can
16 certainly be taken into consideration. In fact,
17 I will instruct you specifically that you are to
18 take into consideration that information. But I
19 need to know whether or not you think the answer
20 to number one is an automatic yes there is a
21 probability simply because you found somebody
22 guilty of a capital murder offense?

23 A. It's not an automatic yes.

24 Q. Do you see what I think is important
25 that issue number one begins as a no? Do you

1 find from the evidence beyond a reasonable doubt
2 there is a probability that the defendant would
3 commit criminal acts of violence that would
4 constitute a continuing threat to society. The
5 answer to that issue is no until the State has
6 proven to your satisfaction beyond a reasonable
7 doubt that the answer should be yes. Part of
8 that can be the case in chief, or all of it can
9 be in the proper set of circumstances. Do you
10 see how that sometimes in some circumstances can
11 be answered no?

12 A. Yes, I do.

13 Q. Even though somebody is convicted of
14 capital murder, there might not be a probability
15 that defendant would commit criminal acts of
16 violence constituting a continuing threat to
17 society?

18 A. That is correct. I guess what I am
19 saying is I think I understand where it can be
20 no sometimes, and it would certainly depend on
21 the circumstances. I can't think, I mean, there
22 are a few circumstances I can think of, I think
23 it just depends on the case. But I think it can
24 be no sometimes.

25 THE COURT: Ms. Davies.

EXAMINATION BY THE STATE

BY MS. DAVIES:

Q. I think in a way what happens here, Mr. Bratton, typical lawyers, we play word games. I think I am understanding what you are saying and that you and I understood each other, but some of the answers began to sound a little different as Ms. Kaiser was questioning you. There are two things here, I think. For most laymen, I think you come in here expecting each of us to try to persuade you of our point of view. And you are absolutely right. That is what we will do. After the evidence is in and the attorneys stand up and argue their case, we are trying to persuade you. I will try to persuade you that the answer to that first question should be yes. And they will be trying to persuade you that I have not brought you enough evidence to justify that, that the answer should be no. But there is a difference between trying to persuade you of something and being required to produce evidence. I am the only one who can ever be required to produce evidence.

1 A. Right.

2 Q. And I think some of your answers,
3 because of the way the questions were worded,
4 sounded like you would require the defense to
5 produce evidence to convince you that the answer
6 to that first question should be no. So that is
7 what we need to clarify.

8 A. Well, I mean, if the evidence was
9 presented by the State that -- I think it would
10 depend on what that evidence is -- I could
11 answer no or yes.

12 Q. You are not telling us that you would
13 require the defense to produce any evidence at
14 any point in the trial; are you?

15 A. No.

16 Q. I think I am hearing you say, that
17 depending on the evidence that is produced from
18 whatever side, that sometimes you would answer
19 that first question yes and sometimes no, just
20 depending on that evidence?

21 A. That is correct.

22 MS. DAVIES: I pass.

23

24

25

1 EXAMINATION BY THE DEFENSE

2 BY MS. KAISER:

3 Q. I don't want you to feel like a ping
4 pong ball. That is what you feel like right
5 about now. Because we are hearing different
6 things, and lots of times we are accused of
7 hearing what we want to hear. I didn't mean to
8 put any words in your mouth at all, and I didn't
9 feel like I did. My thought is still that what
10 you were saying and your feeling is that once
11 you have convicted and found a person guilty of
12 committing capital murder that your initial
13 approach to issue number one is that the answer
14 is yes that he is going to be a continuing
15 threat to society by virtue of the capital
16 murder that you have just found him guilty of
17 committing and that evidence may bring you off
18 of that yes but you are going to start out with
19 a yes and perhaps retreat. But then, when you
20 just spoke with the judge and he said you
21 started out with a no, then you said something
22 different. We just need -- there is no right
23 or wrong answer for you.

24 A. Must be.

25 Q. This is not a pop quiz. You will not

1 be given a grade when you leave the room.

2 A. I understand.

3 Q. I just need to know how you feel.

4 A. Okay, the guy is convicted, you know,
5 of capital murder. And there has got to be some
6 evidence presented by the State that sways me
7 one way, yes or no. And I think there is
8 probably cases -- I can't think of any either
9 way. Well, the one she presented, I guess,
10 there probably, depending on the evidence in the
11 case, you know, I think I can answer yes or
12 no. But I think those circumstances, you know,
13 to get a no, are probably on the end of the
14 scale that she presented, that particular
15 example. I don't know how to explain that any
16 better.

17 Q. So it would be an extremely rare
18 circumstance?

19 A. I think so, yes.

20 Q. And that your predisposition, I guess,
21 would be to view the evidence and weigh it in a
22 manner in which you thought you would be
23 predisposed to thinking that the death penalty
24 might be more appropriate than a life sentence
25 except in a very rare circumstance?

1 A. Still, it depends on the evidence. I
2 mean, I think that evidence has to be -- and I
3 don't know whether it's rare or not as far as
4 cases go, but I think it has to be along the
5 lines of what she presented.

6 Q. But would you be able to start off--

7 A. I would start off at zero. The
8 evidence in the case and I think, you know, at
9 that point I am not yes or no, but I think you
10 look at the evidence and you answer yes or no.

11 Q. Okay. I believe earlier when we
12 talked you expressed the opinion to me, that
13 because of the various nature of all the crimes
14 that have been committed in the community in the
15 recent years and everything, that your view
16 toward the death penalty has become strengthened
17 recently and that, all things being equal, you
18 would be predisposed to thinking that a death
19 penalty would be more of an appropriate
20 punishment than a life sentence once you had
21 found somebody has been guilty of committing
22 capital murder?

23 A. I didn't say that.

24 MS. DAVIES: Your Honor, I have to
25 object to misstating Mr. Bratton.

1 THE COURT: He just said he didn't say
2 that.

3 A. I said that -- I guess I think the --
4 I don't agree with the laws as they are. I
5 think I can abide by them. I think the
6 punishment should be much stronger than it is.
7 But the law is not that way, and I think I can
8 follow what the law is, is all I am saying. If
9 I was making the rules, it might be different,
10 but I am not.

11 MS. KAISER: I have no further
12 questions.

13 THE COURT: Could you step outside
14 this door for just a minute, please?

15 (The prospective juror leaves the
16 courtroom).

17 THE COURT: What says the State?

18 MS. DAVIES: I don't think the State
19 gets to say anything.

20 THE COURT: That is true.

21 MS. DAVIES: I certainly will accept.

22 MS. KAISER: For the record, since the
23 juror was in here, I wasn't allowed to fully
24 enunciate my motion for challenge, and I would
25 like to do that at this point.

1 THE COURT: We covered everything.

2 MS. KAISER: We covered everything. I
3 would like to be more specific.

4 THE COURT: Go ahead.

5 MS. KAISER: I challenge this juror
6 for cause because according to 35.16 (c) 2 he
7 has a bias or prejudice against the law in the
8 case to which the defendant is entitled, and
9 that, although he certainly waffled there toward
10 the end, he was very explicit in both his
11 answers to the prosecutor, which I made
12 notations from, which caused me to go back and
13 question him further, that on issue number one
14 the fact that he has found a person guilty of
15 capital murder he would come from the position
16 that they were, by virtue of that guilty
17 finding, a continuing threat to society, and
18 would require the defense to bring information
19 and evidence to him to convince him that somehow
20 they would not be a continuing threat to
21 society. I realize that upon further
22 questioning he sat there and waffled around a
23 bit, but he said it several times when I was
24 talking to him and was very pointed in that
25 statement. And I believe that particular

1 situation causes this juror to be disqualified
2 for cause.

3 THE COURT: Motion is denied.
4 Challenge overruled. Whichever may be
5 appropriate.

6 Now what says the defense?

7 MS. KAISER: The defense will strike
8 this juror.

9 THE COURT: Prospective juror number
10 fifteen on panel number six, Mr. Todd Bratton,
11 is struck by the defense as a prospective
12 alternate on this jury.

13 ROBERT GUERRERO,
14 called as a prospective juror, was examined as
15 follows:

16 EXAMINATION BY THE COURT

17 Q. This is prospective juror number
18 seventeen on panel number six, Mr. Robert
19 Guerrero. Are you related, by any chance, to
20 Rubin Guerrero, the attorney?

21 A. No.

22 Q. You have had the same job the last two
23 and a half years?

24 A. Correct.

25 Q. Where did you work before that?

1 A. Johnston Pumps service center. I was
2 there eight years with the company.

3 Q. You have five children?

4 A. That is correct.

5 Q. You had three or four in diapers at
6 the same time; didn't you?

7 A. Yes, sir.

8 Q. The oldest one is self-employed doing
9 what?

10 A. He is in the pharmaceutical sales. I
11 don't know the name of the company.

12 Q. What does Robert do?

13 A. He is a truck driver for the company.
14 Delivery service.

15 Q. And Michael at Continental?

16 A. Yes.

17 Q. What does he do?

18 A. He works in ticketing, ticket agent.

19 Q. And the two girls are married?

20 A. That is correct.

21 Q. About twenty years ago, you served on
22 a jury?

23 A. As well as I can remember, it has been
24 about that long.

25 Q. You say it was a robbery case?

1 A. That is correct.

2 Q. And y'all reached a verdict in the
3 case but you did not set the punishment?

4 A. That is correct.

5 Q. Your wife doesn't work outside the
6 home; right?

7 A. Not at the present, sir.

8 Q. Pages eight and nine of this
9 questionnaire ask you to look at statements and
10 either check the one which best summarizes your
11 views about capital punishment or asks you to
12 agree or disagree with the statement. It
13 appears you think capital punishment is wrong;
14 you don't necessarily believe in it but you are
15 in favor of it as an appropriate penalty in some
16 cases; correct?

17 A. That is correct.

18 Q. When I am talking about a capital
19 offense I am talking about one for which on
20 conviction there are only two possible
21 punishments, either a life sentence or the death
22 penalty. There is a statement that reads: Any
23 person, man or woman, young or old, who commits
24 capital murder should pay with his own life. I
25 want to see what you think about that or make

1 sure you understand that if you convict somebody
2 of capital murder the death penalty is not
3 automatic in our system. Do you think it should
4 be automatic?

5 A. I think it should, Your Honor. I
6 really do. My personal convictions, I do.

7 Q. Did you understand the method by which
8 we go about assessing punishment in a capital
9 murder case when I spoke to the jury the other
10 day? We don't ask you to go back and vote for
11 life or death; we, instead, ask you to answer
12 certain questions.

13 A. Correct.

14 Q. It's going to depend on how you answer
15 those questions as to whether or not I assess
16 the death penalty. Did you understand how that
17 worked pretty much, sir?

18 A. Yes, I did.

19 Q. We give you those two special issues
20 to answer, and we would say that the answers
21 aren't automatic, but we want to know if you are
22 so convinced that the death penalty should
23 automatically result in the capital murder case
24 that you would always answer those questions a
25 certain way to make sure a death penalty results

1 instead of basing your answer on the facts and
2 circumstances of the individual case.

3 A. Correct.

4 Q. Which?

5 A. Well, I do believe in the death
6 penalty if someone takes someone else's life.
7 If I may take the court's time just a little bit
8 because it happened in our family.

9 Q. Okay, tell me a little bit about it.

10 A. A member of our family was murdered,
11 and.

12 Q. How long ago?

13 A. It happened about twenty years ago.
14 And the gentleman was given lesser punishment.
15 I think they went for the death penalty, and he
16 was given lesser. They use to call it murder
17 one or murder two. The gentleman is out on the
18 street right now.

19 Q. Who was this family member?

20 A. First cousin of mine.

21 Q. Where was he when he was killed?

22 A. This happened on the north side area
23 of town. He went to collect his money from a
24 job he had worked on, and the altercation
25 happened to come up, and the other guy pulled a

1 gun on him and killed him.

2 Q. Did you go to the trial on that case?

3 A. No, sir, I didn't go to the trial.

4 Q. But you were close to this person who
5 was killed?

6 A. Right. My first cousin.

7 Q. Well, that sounds like, what you have
8 described basically sounds like what we would
9 call first degree felony murder.

10 A. Right.

11 Q. Or simple murder or straight murder,
12 whatever you want to call it. And the range of
13 punishment now -- of course, I don't exactly
14 know what year that occurred, I don't know what
15 penal code that might have been tried under, but
16 the range we have now is if somebody is
17 convicted of the first degree felony offense of
18 murder the range of punishment is by confinement
19 in the penitentiary for not less than five years
20 nor more than 99 years or life. Do you happen
21 to know what the term was this man got who
22 killed your cousin?

23 A. I think it was called a second degree.

24 Q. I mean how many years he got?

25 A. I think he got from five to twenty.

1 Q. You understand capital murder is
2 different from murder. You have to have a
3 murder but you have to have something in
4 addition to make it capital murder, so we are
5 not looking at that range of punishment in terms
6 of years, we are looking at only two
7 possibilities, life or death?

8 A. Right.

9 Q. I had told the jurors about the
10 different ways in which a murder case is
11 elevated to capital murder. There is a question
12 in the questionnaire or statement which says:
13 Capital punishment should be available as
14 punishment for more crimes than it is now. Most
15 people do answer that not knowing all the
16 different circumstances for which capital
17 punishment is available presently, everything
18 from a police officer being killed in the line
19 of duty to a fireman, to murder for hire, murder
20 while somebody is committing another felony,
21 like kidnapping or rape or burglary or arson.
22 One of the ways we have is when people commit
23 more than one murder in the same transaction.
24 But we have all these different kinds of schemes
25 so that if anybody is convicted of one of those

1 offenses as a capital murder offense the only
2 possibilities are a life sentence or a death
3 sentence. We ask you to answer those questions
4 for me to assess punishment. How you answer
5 those questions is going to determine what I
6 do.

7 A. Right.

8 Q. I want to know whether or not, if you
9 sat on a jury and if you happened to participate
10 in a guilty verdict of capital murder, if there
11 is the possibility out there that you are going
12 to be able to vote yes or no on either one of
13 these questions, depending on what the
14 circumstances are, or if you are always going to
15 answer a certain way, no matter what the
16 circumstances are, just to make sure that a
17 death penalty results?

18 A. I agree with you. I understand what
19 you are saying. But there again you are right,
20 I would have to sit on the jury panel to find
21 out what the circumstances were where I could
22 really come up with an evaluation of the
23 judgment.

24 Q. Do you think that there might be a
25 case out there the circumstances of which where

1 you would be able to answer those special issues
2 in such a way that the death penalty didn't
3 result?

4 A. It's a possibility.

5 Q. All right. Let's talk about some of
6 the general concepts I talked to you about
7 yesterday. Presumption of innocence. A
8 defendant is presumed innocent. This defendant
9 or no defendant is a little bit guilty when they
10 sit in the courtroom. They are presumed
11 innocent. Do you agree with that, sir?

12 A. Yes, I do.

13 Q. The State has the burden of proof.
14 Their burden is to prove the defendant's guilt
15 beyond a reasonable doubt. Do you agree with
16 that, sir?

17 A. Yes, I do.

18 Q. The indictment in a case is no
19 evidence of guilt whatsoever. Do you agree?

20 A. I agree with that.

21 Q. If a defendant does not take the stand
22 and testify in his own behalf you cannot
23 consider that as any evidence of guilt
24 whatsoever.

25 A. No, I won't, Your Honor.

1 Q. You agree with me then?

2 A. Right.

3 Q. We talked about those different ways
4 of committing the offense of capital murder.
5 We talked about how if you convict somebody of
6 capital murder the only possible punishments are
7 life or death. There are two steps in the
8 process. You never got to that in that case
9 that you sat on twenty years or so ago, but if
10 somebody is found guilty there is a second stage
11 of trial where the jury gets to hear some
12 additional information. They may be able to
13 hear some additional information. Each side has
14 the opportunity to go forward. They are not
15 required to, but they have the opportunity to
16 call additional witnesses, to present additional
17 evidence, present some witness who might have
18 mitigating evidence about a defendant, something
19 that you think should weigh in his favor perhaps
20 in deciding life versus death when you're
21 answering those special issues. After that
22 stage has ended, I send you back and ask you to
23 answer these two questions, you and the other
24 members of the jury. That first question -- I
25 will refer you over there to the board to take a

1 look at it -- asks whether there is a
2 probability that the defendant would commit
3 criminal acts of violence that would constitute
4 a continuing threat to society. In this issue
5 we are asking the jury to make a determination
6 as to a defendant's future dangerousness. I
7 would instruct you that you are to consider all
8 the evidence admitted at the guilt or innocence
9 stage and at the punishment stage, including
10 evidence of the defendant's background or
11 character or the circumstances of the offense
12 that militate for or mitigate against the
13 imposition of the death penalty. By
14 probability, in common usage, that word we would
15 say means more likely to occur than not. That
16 last word, society, is a term which is going to
17 go undefined. There will not be a definition of
18 the word society in the Court's Charge, but we
19 know that society includes all of society,
20 includes people in the penitentiary as well as
21 people out of the penitentiary.

22 A. Correct.

23 Q. Can you see that, sir?

24 A. Right.

25 Q. We ask the jury to answer special

1 issue number one yes or no. It takes all
2 twelve jurors agreeing unanimously to return a
3 yes answer. Ten or more can agree to return a
4 no answer. If the jury answers that no, I
5 assess life imprisonment. If the jury answers
6 it yes, then I ask them to take a look at issue
7 number two.

8 Now, as to issue number one, first of
9 all, you realize you have already found somebody
10 guilty of the offense of capital murder?

11 A. Right.

12 Q. And then you have to take a look at
13 that special issue and decide whether or not the
14 State has proven to you beyond a reasonable
15 doubt that there is a probability that defendant
16 is going to commit criminal acts of violence
17 constituting a continuing threat to society.

18 Do you see how in some circumstances
19 that question can be answered no?

20 A. Certainly.

21 Q. Okay. And in some circumstances it
22 can be answered yes?

23 A. Right.

24 Q. Just depends on the individual case?

25 A. Correct.

1 Q. If the jury has answered number one
2 yes, you proceed to number two. Number two asks
3 whether, taking into consideration all the
4 evidence, including the circumstances of the
5 offense, the character and background of the
6 defendant and the personal moral culpability of
7 the defendant, there is a sufficient mitigating
8 circumstance or circumstances to warrant that a
9 sentence of life imprisonment rather than a
10 death sentence be imposed. I would instruct you
11 that you are to consider mitigating evidence to
12 be evidence you might regard as reducing a
13 defendant's moral blameworthiness. You have to
14 answer that one yes or no also. If all twelve
15 jurors answer that no unanimously after a
16 unanimous yes on number one, I assess the death
17 penalty. If the jurors, ten or more of them,
18 agree on yes answer to number two, I assess life
19 imprisonment. So you get to know in advance
20 that if you answer no on number one or a yes on
21 number one and yes on number two I assess a life
22 imprisonment sentence. If you answer yes on
23 number one and no on number two I assess the
24 death penalty.

25 A. Okay.

1 Q. Do you see how number two can
2 sometimes be answered yes and sometimes be
3 answered no?

4 A. Right.

5 Q. Each one of these answers, how the
6 jury goes about evaluating those special issues
7 and the answering is going to depend on what you
8 have before you, what kind of evidence you have
9 in front of you. Do you agree?

10 A. Yes, sir.

11 Q. Our statutes don't tell us, they don't
12 define for us what mitigating circumstances are,
13 they don't limit them, they don't limit the
14 aspects of a defendant's character or reputation
15 or the circumstances of the offense that are
16 mitigating. And our law doesn't set out any
17 kind of formula for the jurors to determine how
18 much weight to give a mitigating circumstance.
19 It's left up to the jurors. I don't know what,
20 if anything, might be presented in this case.
21 We don't have a list of twenty different kinds
22 of things that might be mitigating or twenty
23 thousand different kinds of things. There may
24 be a whole lot of things that are mitigating or
25 different jurors would see as mitigating.

1 Whatever it is, you make your own determination
2 as to how much weight to give it in answering
3 number two. We know that mental retardation and
4 mental illness are mitigating circumstances, for
5 example. We know that in the proper case
6 mitigating evidence can include such things as
7 the defendant's good behavior in prison or in
8 jail; it can include an exceptionally unhappy or
9 unstable childhood; childhood drug abuse or
10 economic deprivation, youth, a defendant's age,
11 voluntary intoxication, drug dependency,
12 illiteracy, opinion testimony of lay witnesses
13 or psychiatric opinion testimony that a
14 defendant would not be a danger in the future.
15 All those kinds of things in the proper case can
16 be mitigating. Those and perhaps many, many
17 more. From whatever it is you hear at either
18 the first stage of trial or in the penalty stage
19 of trial, you have to evaluate that evidence.
20 You decide how much weight to give a mitigating
21 circumstance. You might hear evidence about
22 somebody's drug dependency and think that
23 deserves a whole lot of weight. Or you might
24 hear evidence from some psychiatrist that a
25 defendant would not be a danger in the future

1 and decide not to give it much weight. It's up
2 to you to decide.

3 A. Right.

4 Q. You do see how that could be answered
5 yes under some circumstances and no in others?

6 A. Yes, sir.

7 Q. We need to make sure that you are not
8 going to automatically answer these one way or
9 the other, that you are going to wait, evaluate
10 the evidence and then make a determination and
11 realize that there is some situation out there
12 where you know you would be able to answer that
13 either way depending on the facts.

14 A. Right.

15 Q. That is why I was questioning you so
16 much on the death penalty earlier because, even
17 though you had checked the box that says you are
18 strongly in favor of capital punishment, you see
19 it's not an automatic kind of thing in a capital
20 murder case?

21 A. Right.

22 Q. You have to answer those special
23 issues.

24 A. Right.

25 Q. On number one, the State has to prove

1 to your satisfaction that that defendant does
2 have a probability of committing criminal acts
3 of violence constituting a continuing threat to
4 society. Do you see that, sir, and agree with
5 it?

6 A. Right.

7 Q. Is there anything about your views
8 regarding capital punishment or the death
9 penalty which would substantially impair or
10 prevent the performance of your duties as a
11 juror in accordance with the instructions I
12 would give you and your oath as a juror?

13 A. No, none at all.

14 THE COURT: Ms. Davies.

15 EXAMINATION BY THE STATE

16 BY MS. DAVIES:

17 Q. Hello, Mr. Guerrero.

18 A. Good afternoon.

19 Q. I want to talk to you a little bit
20 more, hear a little bit more about your
21 attitudes and your beliefs. You know, we talk
22 a lot about a fair trial. The judge has gone
23 over that list of constitutional rights that the
24 defendant has. And it's very important to all
25 of us to be sure that his rights are protected

1 so it's a proper trial and it's a fair trial.
2 He doesn't have a right to a juror without
3 strong feelings, you know. We all come to the
4 courtroom, all jurors do, with their own
5 personal experiences and attitudes. But he
6 certainly does have a right to a jury that will
7 follow the law and respect his constitutional
8 rights. So we want to be sure that you are able
9 to do that.

10 A. Yes.

11 Q. I didn't mean to cut you off.

12 A. No, that's fine.

13 Q. You know, we talk about fairness. As
14 far as I am concerned, it has to be fair to both
15 sides of the table, too. The State deserves a
16 fair trial.

17 A. Right.

18 Q. And, so, it's kind of like bounce back
19 and forth because I know that some of the
20 things, if I don't ask you about it, when Mr.
21 Stafford gets a chance, or Ms. Kaiser, whichever
22 one is going to talk to you, when they talk to
23 you they will be concerned about some of these
24 things.

25 A. Certainly.

1 Q. For example, you have mentioned this
2 experience in your family, having the tragedy of
3 having a close relative killed. That is
4 something that you will have with you always. I
5 am sure you have very strong feelings about it.

6 A. Right.

7 Q. Certainly this defendant didn't have
8 anything to do with his death.

9 A. Correct.

10 Q. Can we be sure that you are not going
11 to hold that experience against this defendant?

12 A. If I am picked as a juror, I certainly
13 would not. I would try my best to do the job
14 as honest as I can come up with.

15 Q. Okay. That is all anybody could ask
16 of you.

17 A. Correct.

18 Q. But I am sure you can see why the
19 defense would be concerned about that.

20 A. I certainly can.

21 Q. Before we get into talking about some
22 of these issues and all, I know some of the
23 things we talked about yesterday are touchy
24 subjects for some people, and you mentioned this
25 person who killed your cousin is out on the

1 street. Several people have expressed concern
2 yesterday about early parole.

3 A. Correct.

4 Q. And you know from Judge Wilkinson that
5 he is going to instruct this jury that you
6 cannot consider when someone might be parolled
7 in reaching a verdict, a sentence in a case.

8 A. Correct.

9 Q. Can you assure us that you can follow
10 the judge's instruction in that regard?

11 A. If I am picked as a juror, I certainly
12 can.

13 Q. Okay. You might disagree with the way
14 things work right now, but you still can follow
15 the instruction?

16 A. Well, I would do my best to serve as
17 honestly as, well, see the presentation of the
18 crime.

19 Q. In other words, base your sentence on
20 the evidence you have heard?

21 A. On the evidence I heard.

22 Q. Not on some idea of when this person
23 might get out of prison if you gave him a life
24 sentence?

25 A. Well, yes.

1 Q. Does that sound right to you?

2 A. Right.

3 Q. Okay. I guess one of the other things
4 that we talked about yesterday that probably is
5 a little difficult for some people. I had told
6 you about how in some instances I might offer a
7 defendant's statement. And the judge would tell
8 the jury that they would have to decide whether
9 it was a voluntary statement. And they have to
10 be convinced that it was voluntary to consider
11 it as evidence. If they are not convinced that
12 it's voluntary, they would have to literally
13 throw that evidence out. It wouldn't make any
14 difference whether it failed the test of
15 voluntariness, whether it was because some
16 officer had really gone out of bounds and abused
17 and mistreated a prisoner or whether it was
18 because they just didn't dot their I's and cross
19 their T's, didn't follow every little step.

20 A. Right.

21 Q. The consequence is that if you as a
22 juror were not satisfied that it was voluntary
23 and you decided you had to disregard that
24 evidence you would have to just look at the
25 other evidence. It's a tough situation. If you

1 look and there is no other evidence and you
2 might be in the position of having to find
3 somebody not guilty even though you heard and
4 read a statement that convinces you they did the
5 crime. That is a tough one for some people, but
6 that, too, is a part of the instruction the
7 judge is going to give you. Can you follow
8 that aspect?

9 A. Yes.

10 Q. Okay. I think you have made clear
11 that you believe the death penalty is necessary
12 in some cases?

13 A. Yes, I do.

14 Q. If I bring you the evidence that
15 convinces you that it's right, you are convinced
16 beyond a reasonable doubt, can you actually
17 participate in a verdict that would result in
18 the death penalty?

19 A. Yes, I could.

20 Q. Sometimes the only evidence you have
21 is the evidence surrounding a capital murder
22 offense, in other words, no background
23 information, just the crime itself. Can you see
24 that sometimes the offense alone would be enough
25 to justify the death penalty?

1 A. Yes, I could.

2 Q. Other times you might have more?

3 A. Right.

4 Q. But not always. We keep hearing the
5 phrase as we talk, beyond a reasonable doubt.
6 Judge is going to give you a definition, an
7 instruction in that regard. It makes clear that
8 beyond a reasonable doubt does not mean beyond
9 all doubt. However, some people disagree with
10 that. Some people feel like when we are talking
11 capital murder, we are talking about the death
12 penalty, that they would have to have more than
13 beyond a reasonable doubt. I need to know how
14 you feel.

15 A. Well, with the evidence presented,
16 with all reasonable doubt, I could vote for the
17 death penalty where the evidence was presented
18 to the jury.

19 Q. If I convince you beyond a reasonable
20 doubt?

21 A. Correct.

22 Q. One of the things talked about
23 yesterday was intent because I have to prove
24 beyond a reasonable doubt that there were two
25 intentional murders committed. That is what

1 makes up the capital murder in this case, the
2 intentional murder of Charles and Bradley Dean
3 Allen. I suggested that the intent to kill can
4 be formed very quickly. Do you have any
5 disagreement with that?

6 A. No, I don't.

7 Q. We didn't talk about self-defense.
8 And that is something that comes up in most any
9 murder case. Do you feel like that each of us
10 have the right to defend ourselves and our
11 family?

12 A. Yes, I do.

13 Q. The law certainly agrees with that.
14 You do have. There are limitations. You can
15 only use that degree of force that is
16 immediately necessary in the circumstances.
17 And you have to be acting lawfully. You have to
18 be responding to unlawful force. The other
19 requirement is that a person retreat if they can
20 reasonably do so or if a reasonable person would
21 do so in the circumstances. I know we all hear
22 situations where somebody is in the middle of
23 committing a robbery or a burglary and the
24 person, say, that they are robbing tries to
25 defend themselves, and the robber turns it

1 around and says: Oh, well, I shot him because I
2 had to protect myself. How do you feel when you
3 hear things like that in the news?

4 A. Well, you hear so much of that
5 nowadays, you see it constantly in the news, the
6 news media. I really feel that they are taking
7 the privilege of the citizen away from them when
8 robbery is committed, murder is committed, that
9 they should be punished. Again, that is my
10 personal opinion. Like you say, it can happen
11 to anybody nowadays.

12 Q. Well, it's kind of a distortion of the
13 notion of self-defense because, at least the way
14 I understand the law, the burglar or the robber,
15 the one who is breaking the law, doesn't have
16 the right to self-defense. He is acting
17 unlawfully to begin with. It's the victim who
18 has the right to defend themselves.

19 A. Right.

20 Q. Now, that might be the kind of thing
21 that somebody might consider mitigating. Say,
22 well, you know, I shot him because of something
23 they did. Maybe, maybe not. In a trial -- I
24 think you said you have never served on a jury
25 before; am I right?

1 A. Yes, I did serve on a jury.

2 Q. You did. As soon as I said that, I
3 knew I was wrong. Was there anything about that
4 that bothered you? Were you pleased with the
5 outcome?

6 A. Well, I think later we found out that
7 he was -- the reason they didn't sentence him
8 because he was up for other trials besides the
9 one he was being tried for at that particular
10 time that I was on the jury.

11 Q. Okay. So the judge did the
12 punishment?

13 A. I guess so. Then we were told by the
14 district attorney that he had other trials. He
15 was charged with other charges besides the
16 robbery charge.

17 Q. Okay. So, what?

18 A. We did find him guilty of that
19 particular.

20 Q. So you don't really know what the
21 sentence turned out to be?

22 A. No.

23 Q. Well, so, you didn't do the two stages
24 of trial?

25 A. No.

1 Q. You just did the first part. And the
2 first part of this trial will be similar if you
3 remember how that went. You hear the evidence
4 only about the offense, not about any past
5 history.

6 A. Correct.

7 Q. Because that is basically not fair.
8 You should be put on trial for did he do this
9 trial. You hear all the evidence, the
10 attorneys will argue, the judge gives the
11 instruction and then the jury goes back to
12 deliberate. Did y'all reach a quick verdict in
13 that case?

14 A. Well, as I recall, it probably took
15 about an hour.

16 Q. Okay. That is pretty quick,
17 actually. You know, nobody ever expects an
18 instantaneous verdict. Deliberate means just
19 that, the jury is going to go back there, talk
20 to one another, think about it, consider the
21 evidence and collectively reach a decision.
22 It's only after the jury has reached a unanimous
23 verdict of guilty of capital murder that you
24 move then into the second stage of trial. As I
25 already said, sometimes there is no additional

1 evidence. Sometimes I would be asking the jury
2 to answer those questions yes, no to result in
3 the death penalty based just on the facts of the
4 crime itself. Other times there would be
5 additional evidence. Now, the burden of proof
6 is always on the State even at that second stage
7 of trial. You know, you may assume that as a
8 rule mitigating type evidence is going to come
9 from the defense. And it may. They can bring
10 evidence if they want to, they have the same
11 subpoena power as the State, but you can't ever
12 require them to produce any evidence. Does that
13 sound fair?

14 A. Right.

15 Q. I have got to prove the case. I have
16 to convince you first of guilt, then at the
17 second stage I have to convince you that that
18 question about future dangerousness should be
19 answered yes. The defense doesn't have to
20 prove or introduce evidence of any kind. Now,
21 when the lawyers get to argue, they will try to
22 persuade you one way or the other, just like I
23 will; but it always is only the State that has
24 to bring forward any evidence. Sometimes even
25 in the evidence I bring there may be something

1 that you think of as mitigating. You know, I
2 put on my case, and as my victim or witnesses
3 describe what happened you might find out that
4 the defendant is very young. It's even
5 conceivable that you could find out that the
6 defendant had an abused childhood. Say if I
7 was putting on evidence in a case that involved
8 a rape and murder, there might be a witness who
9 was hiding and heard the whole thing and heard
10 them tell them I am going to beat you, I am
11 going to burn you like my mommy used to do to
12 me, you know, the defense didn't bring it out,
13 it just happened to come out in the State's
14 case. And it might be background information
15 that you might consider mitigating. I am just
16 using that as an example to illustrate.
17 Conceivably, mitigation can come from the state
18 or from the defense. At any rate, wherever the
19 evidence comes from, at that second stage of
20 trial you still will look at the evidence of the
21 facts surrounding the crime, plus any background
22 information. There could be background
23 information about past criminal history or good
24 history, church-goer, hardworker, family man,
25 that kind of thing. You consider it all. Can

1 you keep an open mind and consider any and all
2 of the evidence that is presented to you?

3 A. Yes, I could.

4 Q. What kind of weight you give it is up
5 to you, little or great. Just consider it all.

6 A. Correct.

7 Q. You first look at question number one
8 that talks about probability of future
9 dangerousness. And this is the one I have got
10 to produce the evidence and I have got to
11 convince you beyond a reasonable doubt that
12 there is a probability that the defendant would
13 commit criminal acts of violence that would
14 constitute a continuing threat to society. Do
15 you feel like that question can be answered yes?

16 A. Yes.

17 Q. Given the proper information?

18 A. That is correct.

19 Q. You are not ever going to be
20 absolutely certain about what somebody is going
21 to do in the future. That talks about
22 probability. Do you think that is appropriate?

23 A. I think so.

24 Q. Talks about probably going to commit
25 criminal acts of violence. Doesn't say murder

1 but criminal acts of violence. Do you feel like
2 there may be some acts of violence or criminal
3 acts that would constitute a continuing threat
4 to society short of murder?

5 A. Certainly.

6 Q. And the concern there is whether there
7 is a threat to society. It uses the word
8 society. Most of us haven't given much thought
9 to what that word means. The judge has already
10 told you that here in the courtroom it includes
11 prison. That doesn't mean it's limited to
12 prison, of course. It includes everybody. You
13 know, some people live in houses, some in
14 apartments. These days we see people living on
15 the street, and there are some people living
16 behind prison walls.

17 A. Correct.

18 Q. We don't want you to exclude
19 anybody. Can you assure us that you would
20 consider all aspects of society?

21 A. Yes, I could.

22 Q. If you should answer that question yes
23 -- well, let me back up and ask it this way.
24 Can you see that sometimes you might answer that
25 question yes and sometimes you might answer it

1 no, depending on the evidence?

2 A. That is correct.

3 Q. You are not going to automatically
4 answer either way?

5 A. No, I wouldn't automatic, no.

6 Q. Do you feel like you are predisposed
7 or inclined to look for a way to try to
8 manipulate your answers to get the result?

9 A. No, I wouldn't do that.

10 Q. You are just going to look at the
11 evidence?

12 A. I am going to look at the evidence,
13 definitely.

14 Q. If I bring you the evidence that
15 convinces you that the answer should be yes and
16 that is one step on the way to the death
17 penalty, can you do that?

18 A. Yes, I could.

19 Q. If the twelve jurors agree and answer
20 that question yes, then you would look at the
21 second question. And that is the one that talks
22 more about mitigation. It's a very wordy
23 question. Basically I think what it is telling
24 you is look again at all the evidence, keep in
25 mind the facts of the offense but don't forget

1 any mitigation that is in there, and you decide
2 whether there is sufficient mitigation that this
3 person deserves a life sentence instead of the
4 death penalty. If you think there is sufficient
5 mitigation, you answer it yes, and he gets a
6 life sentence. If you don't think the
7 mitigation is sufficient, you answer it no.

8 A. Correct.

9 Q. And the result is the death penalty.
10 Can you see yourself answering it either way
11 just depending on the evidence?

12 A. I would have to weigh it on the
13 evidence, definitely.

14 Q. What is mitigating is something that
15 nobody is going to try to give you a limiting
16 list. You might be able to think of twenty
17 things that to you are mitigating that I would
18 never have dreamed of, and I may be able to
19 think of something you wouldn't have thought of.

20 A. Correct.

21 Q. I think the important thing is, you
22 know, whether it's retardation or abused
23 childhood or because someone is addicted to
24 drugs or whatever, the important thing is can
25 you keep an open mind and consider anything as

1 mitigating if within the facts of this
2 particular case you thought it was? I didn't
3 word that very well. It got long.

4 A. If I answer yes to issue number one,
5 if I was presented all the evidence, and we had
6 to mitigate on like you are talking about
7 bringing up something before that, I made up my
8 personal mind about it, I don't think I could be
9 persuaded either way then if I had all the
10 evidence present.

11 Q. Okay, I am not sure that I am
12 understanding.

13 A. Well--.

14 Q. If you answered issue number one,
15 let's assume that you have answered it yes.
16 You think this person is a continuing threat
17 because you don't even look at number two--

18 A. Right.

19 Q. -- unless you have decided, yes, the
20 person is a continuing threat. So, when you
21 look at issue number two, you have already
22 decided the person is guilty of capital murder.
23 And you have decided, yes, they are a continuing
24 threat to society. This is like, you know, a
25 fail-safe. Look at it again, now don't forget

1 to look at the mitigation, weigh it, decide is
2 it sufficient.

3 A. Correct.

4 Q. That the person deserves life instead
5 of death. Okay. Now, what are you telling me
6 here? At first I thought I heard you say you
7 would answer it yes or no, depending on the
8 evidence.

9 A. That is what I meant.

10 Q. Okay.

11 A. We go back. You said you will send
12 us back again to mitigate, to weigh the first
13 one?

14 Q. No. You are going to go back in the
15 jury room -- after you have found him guilty,
16 you are going to come out and hear more evidence
17 at the second stage of trial. Then, when you go
18 back into the jury room the second time to
19 deliberate, to decide on the sentence, you will
20 look at the evidence, answer question number
21 one, you are still back there in the jury room,
22 look at the evidence again and answer question
23 number two. Okay?

24 A. Right.

25 Q. And I just want to be sure I am

1 understanding you to say that your answer to
2 question number two could be yes or no just
3 depending on whether you think there is
4 sufficient mitigation or not?

5 A. That is correct.

6 Q. Sometimes there may be, sometimes
7 there may not.

8 A. That is correct.

9 Q. No automatic answers either way?

10 A. No.

11 Q. And, yet, at the same time, I want to
12 be sure, if you think there is not sufficient,
13 can you answer that no, knowing the result is
14 going to be the death penalty?

15 A. That is correct.

16 Q. Do you have any questions for me?

17 A. Oh, no.

18 MS. DAVIES: Thank you. Pass.

19

20

21

22

23

24

25

EXAMINATION BY THE DEFENSE

BY MS. KAISER:

Q. Afternoon, Mr. Guerrero. How are you?

A. Good afternoon.

Q. Initially when you were speaking with the judge -- and I know that it was all new subject matter to you and you are learning as you go along -- you indicated that what sounded to me like a pretty strong belief, that once a person is convicted of having committed capital murder, that the death penalty ought to be pretty close to automatic. Do you still feel that way?

A. Yes, that is my deep personal opinion.

Q. Okay. And although I am sure you gathered by the questions that the judge has posed to you and Ms. Davies has posed to you that our law provides a selection of penalty, it's not an automatic thing, it's either life imprisonment or the death penalty, you understand that our law provides for those two options; but am I understanding, that although the law provides for those two options, your personal opinion, that once a person has been convicted of capital murder, that the death

1 penalty should be an automatic thing?

2 A. Yes, I do.

3 Q. And, so, your belief along those
4 lines I guess is based on your personal family
5 experience?

6 A. That is correct.

7 Q. Probably in addition to all the things
8 that you have seen on TV and read in the
9 newspaper and things like that?

10 A. That is correct.

11 Q. Has that been your feeling for quite a
12 while, or has it changed -- how long ago was the
13 killing of your cousin?

14 A. About twenty years ago.

15 Q. About the same time you served on the
16 jury?

17 A. Yes.

18 Q. Had that happened at the time you
19 served on that jury?

20 A. I don't remember.

21 Q. Has your opinion gotten stronger as
22 the years have gone along?

23 A. Well, I felt that way kind of all the
24 incidents, I mean, you can't look in the paper
25 and television, the crimes that are committed

1 nowadays to citizens, and a lot of them just
2 getting away with murder, period, you know. I
3 have got pretty bad feelings about that.

4 Q. And, so, do you think, that once a
5 person has been found guilty of committing a
6 capital murder, sexually assaulted someone,
7 killed them in the commission of the sexual
8 assault or killed two people in the same
9 criminal transaction, once they have been found
10 guilty of that, can you even envision a
11 situation that life imprisonment might be an
12 appropriate penalty, or would the death penalty?

13 A. The death penalty.

14 Q. That's it. And you recognize that --
15 and this is certainly the time for you to assert
16 your opinion. Even though your opinion is
17 different than what the law allows, right now
18 you are saying you understand what the law
19 allows, but despite that, this is my personal
20 opinion, and you are telling us about it?

21 A. Yes, ma'am.

22 Q. Okay. So, if I as the defense lawyer,
23 I mean, and be honest with me, you are not going
24 to hurt my feelings at all, if I as the defense
25 lawyer am trying a capital murder case and I am

1 trying to get a life sentence for my client, do
2 you feel like I have got a fair shake putting a
3 juror like yourself on the jury?

4 A. Well, if I went on the jury panel and
5 made a note, I would have to hear all the
6 evidence presented. I will be as fair as I
7 could. But, again, I am saying my personal
8 views. I should keep them out of it.

9 Q. No, this is the place to tell us your
10 personal views.

11 A. If I was picked as a juror I would
12 sure have an open mind to the evidence presented
13 to make a fair judgment in the best of my
14 ability that I could. That I can.

15 Q. But your personal view -- and viewing
16 the evidence, you are already coming from a
17 pretty strong death penalty position; is that
18 right?

19 A. That is probably true.

20 Q. Even though you are going to look at
21 the evidence and you are going to try to be
22 fair, in your heart you know that you are
23 already kind of leaning that direction; isn't
24 that what you are telling me?

25 A. Probably true, counselor.

1 Q. And, so, although I know people, for
2 some reason, this word kind of has a negative
3 sound to it, but would it be fair to say that
4 personally that you have a bias toward the death
5 penalty in a situation where somebody has been
6 convicted of capital murder?

7 A. Yes, I do.

8 Q. And if you were placed on the jury,
9 you would be required to take an oath that you
10 wouldn't have any biases toward anything, do you
11 really, I mean, deep in your heart do you really
12 think you could put all of that aside, or is
13 that going to kind of be back in the back of
14 your mind?

15 A. That would be hard to answer. There,
16 again, I would try to do my best if I was picked
17 as a juror. My personal feeling still exists.

18 Q. You can't leave it out on the doorstep
19 when you go inside the jury room. You are going
20 to take the personal feelings in there with you.

21 A. I am not really going to try to take
22 them with me, but that is my own personal
23 opinion.

24 Q. And, so, do you feel like anybody that
25 has been found guilty of committing capital

1 murder, are they automatically a continuing
2 threat to society?

3 A. I think so.

4 Q. And, so, if you had found a person
5 guilty of having committed capital murder and
6 then you came back out and started looking at
7 these questions, and that first question asks
8 you whether or not this person, there is a
9 probability that he is going to commit future
10 acts of violence and be a continuing threat to
11 society, just based on what you have just told
12 me, it would appear that, since you have already
13 found him guilty of capital murder, that pretty
14 much the answer to that question is going to be
15 yes because you have already found him guilty of
16 capital murder; isn't that right?

17 A. That is correct.

18 Q. And, so, you are going to be -- how is
19 it that -- so I wonder what it would take to try
20 and get a no -- can you even envision any case
21 in the world that you might be presented with
22 evidence to where the answer to that first
23 question would be no, once you had already found
24 somebody guilty of committing capital murder?

25 MS. DAVIES: I object to trying to get

1 Mr. Guerrero to come up with a fact situation.

2 THE COURT: Sustained.

3 BY MS. KAISER:

4 Q. Do you think in any instance at all, I
5 am not asking for a fact situation, that
6 regardless of whatever evidence was presented to
7 you that there would be any evidence that could
8 be presented to you where the answer to that
9 first question would ever be no, or is it
10 automatically going to be yes they would be a
11 continuing threat to society because they have
12 already been found guilty of committing this
13 capital murder?

14 A. That is the way I feel, counselor.

15 MS. KAISER: Challenge.

16 THE COURT: Off the record.

17 (Off the record).

18 MS. KAISER: Defense exercises a
19 challenge for cause.

20 THE COURT: It's granted or sustained,
21 whichever way you choose.

22 You are not going to have to serve.
23 You may stand down.
24
25

1 LARRY W. WHITTEN,
2 called as a prospective juror, was examined as
3 follows:

4 EXAMINATION BY THE COURT.

5 Q. This is prospective juror number
6 twenty on panel number six, Mr. Larry Whitten.
7 Manager at Radio Shack.

8 How long were you in the Navy?

9 A. Five years.

10 Q. How long were you an MP?

11 A. I cross rated at three years, so I
12 spent my last two years there as an MP.

13 Q. Were you at Norfolk all that time?

14 A. We were stationed in Norfolk. About
15 half that time we were in Europe.

16 Q. So you were just stationed at
17 different Navy ports?

18 A. We were at sea.

19 Q. You were an MP at sea?

20 A. Yes, sir.

21 Q. Not at port?

22 A. No, on board ship.

23 Q. Pages eight and nine of the long form
24 questionnaire list statements and ask you to
25 check the one that best summarizes your general

1 views about capital punishment or asks you to
2 agree or disagree with certain statements.

3 A. Uh-huh.

4 Q. It appears that you are in favor of
5 capital punishment, you don't believe in it,
6 wish it weren't necessary but believe it is
7 necessary for some offenses?

8 A. That's true.

9 Q. At any rate, your decision on whether
10 or not the death penalty should be assessed
11 would depend on the facts and circumstances of
12 the individual case?

13 A. Right.

14 Q. Had you ever been called for service
15 on a criminal jury before?

16 A. Never. I have never been called for
17 jury duty at all.

18 Q. Okay. Some of the general principles
19 we talked about are probably familiar to you
20 anyway. You understand that the defendant, this
21 defendant or any other defendant in a criminal
22 case is not a little bit guilty as he sits in
23 court, he is presumed innocent?

24 A. Right.

25 Q. The burden of proof is on the state,

1 stays on the state to prove the defendant's
2 guilt beyond a reasonable doubt. Do you agree?

3 A. True.

4 Q. The indictment in a criminal case is
5 no evidence of guilt whatsoever.

6 A. True.

7 Q. If a defendant should not take the
8 stand and testify in his own behalf you can not
9 use that as any evidence against him.

10 A. Right.

11 Q. There is a question or a statement on
12 page eight or nine of the long form
13 questionnaire to the effect that capital
14 punishment should be available as punishment for
15 more crimes than it is now. We ask the
16 prospective jurors to answer that prior to the
17 time we talked to them and told them all the
18 many different ways that capital punishment is
19 available as punishment for crimes. We are
20 talking about specifically distinction between
21 murder and capital murder. Murder being an
22 intentional or knowing taking of a human life.
23 That is a first degree felony offense, five to
24 99 years or life. When we are saying capital
25 murder, we are talking about somebody

1 intentionally or knowingly causing the death of
2 another individual but there is some other
3 aggravating factor which makes it a capital
4 offense, that is, an offense for which, on
5 conviction, the only possible punishments are
6 life sentence or the death penalty. We went
7 over briefly the different ways that can be
8 accomplished. One is when someone murders a
9 peace officer or a fireman who is acting in the
10 lawful discharge of an official duty and the
11 person knows that he is a peace officer or a
12 fireman. One is where somebody commits murder
13 for remuneration, murder for hire or promise of
14 payment of money or employs somebody else to
15 commit a murder for hire or the promise of
16 money. One is where somebody commits a murder
17 while escaping or attempting to escape from a
18 penal institution. One is where someone is
19 incarcerated in a penal institution and murders
20 an employee of the institution. The most
21 common type of capital murder offense, the one
22 most people see on television and read about in
23 the newspaper is where a person intentionally
24 commits a murder and he is in the course of
25 committing or attempting to commit another

1 felony. The other felony being kidnapping,
2 burglary, robbery, aggravated sexual assault,
3 arson. The final category is where someone
4 murders more than one person, two or more people
5 in the same criminal transaction. Each one of
6 those types of offenses is a capital murder
7 offense. On conviction, only possible
8 punishments are life or the death penalty. Are
9 those the kinds of offenses you think capital
10 punishment should apply to?

11 A. Definitely.

12 Q. I talked briefly about lesser included
13 offenses the other day. Lesser included
14 offenses of capital murder in a proper case
15 might be such things as murder, first degree
16 felony, five to 99 or life, voluntary
17 manslaughter, second degree felony, two to
18 twenty years, third degree felony offense of
19 involuntary manslaughter, two to ten years.
20 Just stair-stepping from capital murder at the
21 top of this scheme down through the felonies and
22 all the way to misdemeanor that you might in the
23 proper case have an option when you go back to
24 deliberate the case that if you did not find the
25 defendant guilty of the offense of capital

1 murder you might be asked to consider one of the
2 lesser included offenses. But no matter what a
3 person is convicted of, if a jury returns a
4 verdict of guilty, there is a second stage of
5 trial. The jury returns their verdict of guilty
6 and comes back into court and additional
7 testimony may be heard. Each side has the
8 opportunity to call witnesses; each side has the
9 opportunity to present additional evidence in
10 the case. There is another charge, the jury
11 goes back to deliberate, and if it's a capital
12 murder case I don't ask them to go back and vote
13 for life or death, I ask them to go back and
14 answer yes or no to two special issues, two
15 questions that I submit to them. Depending on
16 how the jury answers those questions determines
17 how I am going to assess punishment.

18 Did you understand that is the way it
19 worked?

20 A. Yes.

21 Q. Before you came in here yesterday, did
22 you understand that?

23 A. No, not before that.

24 Q. I am going to ask you to turn over
25 here to the blackboard. If you have found

1 somebody guilty of capital murder and I sent you
2 back in to deliberate on the issue, after the
3 penalty stage you would first be asked to answer
4 number one, which is asking whether there is a
5 probability that the defendant would commit
6 criminal acts of violence that would constitute
7 a continuing threat to society. That is the
8 one where we are asking the jury to make a
9 determination of a defendant's future
10 dangerousness. I would instruct you that when
11 you are answering that question you are to
12 consider all the evidence that was admitted at
13 the guilt or innocence stage plus all the
14 evidence admitted at the penalty stage including
15 evidence of a defendant's background or
16 character or the circumstances of the offense
17 that militate for or mitigate against the
18 imposition of the death penalty. Consider
19 everything you've heard so far in the trial and
20 go back and answer that as to whether or not
21 there is a probability this defendant would
22 commit criminal acts of violence constituting a
23 continuing threat to society. By probability
24 we say it means more likely to occur than not.
25 I believe I explained about the word society the

1 other day, that I won't give you a definition of
2 society, but society does include all of society
3 including society even within the penitentiary.

4 A. Right.

5 Q. Can you see that, sir?

6 A. Yeah.

7 Q. And we ask you to answer that yes or
8 no. If all twelve jurors agree unanimously it
9 should be yes, then you move onto number two
10 special issue. If ten or more people agree that
11 the answer is no there is no such probability, I
12 take the case back, I assess life
13 imprisonment. Okay?

14 A. Uh-huh.

15 Q. Do you see that the answer to number
16 one is not an automatic yes or no; it's going to
17 depend on the individual case you are trying?

18 A. Right.

19 Q. And on the individual circumstances
20 and the evidence put before you both in the
21 first stage of the case and in the penalty stage
22 if either side happens to offer any evidence?

23 A. Uh-huh.

24 Q. It's not an automatic yes or no.
25 Just because you found someone guilty of capital

1 murder doesn't mean that he is necessarily going
2 to be committing criminal acts of violence
3 constituting a continuing threat to society.
4 Do you agree?

5 A. That is true. I do agree.

6 Q. Do you see also how in some cases -- I
7 can't tell you exactly what is going to happen
8 in this case -- but in some cases the jury
9 doesn't have access to a defendant's background
10 or reputation, and sometimes they can just look
11 at the circumstances of the offense committed
12 and say that is so horrible, what that person
13 did, the way he went about doing it, that based
14 on the way that capital murder offense alone was
15 committed we can determine there is a
16 probability that defendant would commit criminal
17 acts of violence constituting a continuing
18 threat to society. Sometimes you have the
19 additional information. Sometimes you don't.
20 Can you see that there might be that kind of
21 case out there somewhere in the realm of
22 hypotheticals?

23 A. Yes, sir.

24 Q. If you have answered that question
25 yes, you move on to question number two. It's a

1 very different kind of question. There is no
2 burden of proof in it like there is on number
3 one. Where the burden of proof in number one is
4 on the State to prove there is a probability
5 beyond a reasonable doubt, in number two you are
6 being asked whether, taking into consideration
7 all the evidence, including the circumstances of
8 the offense, the defendant's character and
9 background and the personal moral culpability of
10 the defendant there is a sufficient mitigating
11 circumstance or circumstances to warrant that a
12 sentence of life imprisonment rather than the
13 death penalty be imposed. So here, once again,
14 you are considering everything from both stages
15 of trial. I will give you an instruction that
16 you are to consider mitigating evidence to be
17 evidence that you might regard as reducing a
18 defendant's moral blameworthiness. You answer
19 that one yes or no. If ten or more people agree
20 the answer is yes, I assess life imprisonment.
21 If all twelve agree unanimously that number two
22 should be answered no after returning a
23 unanimous yes on issue number one, I assess the
24 death penalty. That is the only way the death
25 penalty is assessed. A yes answer on number one

1 coupled with a no answer on number two means I
2 assess the death penalty. Do you understand?

3 A. Yes, sir.

4 Q. So you know in advance exactly what I
5 am going to do depending on how you as a member
6 of the jury answer those special issues. I want
7 to make sure that you are not going to
8 automatically answer one way or another simply
9 because you found somebody guilty of capital
10 murder. You review the evidence and you make
11 that determination. There is always that
12 possibility out there that you can answer either
13 way depending on the circumstances in the
14 individual case you are looking at. Agree?

15 A. Yes.

16 Q. The statutes do not identify or limit
17 the aspects of a defendant's background,
18 reputation, character or circumstances of an
19 offense that are mitigating. They don't set
20 out for us any kind of formula for determining
21 how much weight to give a mitigating
22 circumstance. So I don't know exactly what that
23 might be. You might hear something that you
24 think is a mitigating circumstance and would
25 mitigate against the death penalty from the case

1 in chief, maybe the defendant's age, you heard a
2 witness testify about something in his
3 background and you thought that's a mitigating
4 circumstance, I am going to give that some
5 weight. Perhaps in the second stage of trial,
6 the penalty stage, the defense had called a
7 witness to testify to something about something
8 else in his background that you found
9 particularly mitigating, something about some
10 terrible childhood or some drug dependency,
11 something like that which you might consider
12 would be mitigating. You might get this
13 information from either side at any point during
14 the trial. But you have to review everything
15 that you have heard. There is no list of what
16 is mitigating. I don't have any idea what kinds
17 of different things might come up in this
18 trial. I don't know if there are twenty items
19 on the list or twenty thousand, but we know that
20 certain things in the proper cases are
21 mitigating evidence. We know that mitigating
22 evidence includes such things as mental
23 retardation, mental illness. We know that in
24 the proper case mitigating evidence can include
25 such things as a defendant's good behavior while

1 in prison or in jail perhaps awaiting trial, an
2 exceptionally unhappy or unstable childhood,
3 childhood drug abuse or economic deprivation,
4 youth, a defendant's age, voluntary
5 intoxication, drug dependency, illiteracy,
6 opinion testimony of lay witnesses or
7 psychiatric opinion testimony that somebody
8 would not be a danger in the future. All those
9 things in the proper case may be mitigating.
10 And if you hear something about that, you hear
11 testimony regarding one of those circumstances
12 or perhaps many, many more, you evaluate it, you
13 determine how much weight to give that
14 mitigating circumstance when you are looking at
15 issue number two and you decide whether or not
16 there is a sufficient mitigating circumstance or
17 circumstances to warrant a sentence of life
18 imprisonment being imposed as opposed to a death
19 sentence. Okay?

20 A. Okay.

21 Q. Can you see how both of those could be
22 answered yes or no, depending on the individual
23 case?

24 A. Yes, sir.

25 Q. We want to make sure you are not

1 predisposed to answering the questions in such a
2 way that you insure that a death penalty results
3 or you insure that a life sentence results.
4 Just answer them as honestly as you possibly
5 can. Do you think you can do that?

6 A. Yes, sir.

7 Q. Is there anything about your views
8 regarding capital punishment or the death
9 penalty which would prevent or substantially
10 impair the performance of your duties in
11 accordance with the instructions I would give
12 you and your oath as a juror?

13 A. No, sir.

14 THE COURT: Ms. Davies.

15
16 EXAMINATION BY THE STATE

17 BY MS. DAVIES:

18 Q. Hello, Mr. Whitten.

19 A. How are you doing?

20 Q. Looks like you moved to Houston area
21 when you were about eight years old, something
22 like that?

23 A. No, I was born here. I left here and
24 went to Europe.

25 Q. Okay. I see. So you've got family

1 here in the Houston area?

2 A. Yes, ma'am.

3 Q. What, brothers, sisters, parents,
4 what?

5 A. Parents, aunts, uncles, the entire
6 family.

7 Q. Okay. Do you have brothers or
8 sisters?

9 A. I have a sister.

10 Q. Older or younger?

11 A. Older.

12 Q. So, well, this is home. How old were
13 you when you went into the Navy?

14 A. Eighteen.

15 Q. How did you choose the Navy?

16 A. It's a hard question to answer.
17 Basically I looked at which service was offering
18 what schools and tried to pick out the one that
19 had the best schools and the best educational
20 advancements.

21 Q. You took advantage of some of the
22 educational opportunities in the Navy?

23 A. Yes.

24 Q. I'm going to show my ignorance as far
25 as -- I assume in the military you don't have

1 much choice what area you go into. Then maybe
2 you do. I am curious how you ended up being an
3 MP.

4 A. I cross rated. It's something I
5 elected to do.

6 Q. Okay. And my experience and
7 knowledge of that is like, you know, movies you
8 see, uniform with MP on the arm, and I think of
9 somebody on the street, not on a ship. I was
10 intrigued when you said it was mostly on board
11 ship. What is your job there?

12 A. On board ship as an MP, what you are
13 mainly assigned to do is maintain records on
14 board ship as far as when the CO of the boat
15 assesses punishment you simply make sure that
16 the punishment is carried out. You also take
17 care of shipboard items such as security
18 lockers, anyplace where they would lock up
19 expensive merchandise that is not to be kept
20 available to the crew at all times. That is
21 what we did. It's a lot different than what
22 they show on the movies where everybody is
23 running around..

24 Q. That is what I always pictured, so I
25 couldn't visualize what your job was there.

1 Apparently you left the service. Did
2 you ever consider making it a career or?

3 A. I considered, but I had a better offer
4 come up.

5 Q. Okay. Tell us a little bit about how
6 you -- what your beliefs are about the death
7 penalty. I know we asked it a bunch of
8 different ways, but I think it means more to
9 hear you say what your attitude is.

10 A. Well, as far as the death penalty
11 goes, if it's necessary, it should be carried
12 out. If you tell someone that you are going to
13 execute them, I don't feel that they should have
14 to sit there for five and ten years waiting for
15 you to do it. If they don't deserve it, then
16 there is alternate methods that you can go about
17 other than, you know, sentencing them to death.

18 Q. Like in our capital murder statute
19 there are two possibilities, the death penalty
20 or life sentence.

21 A. Right.

22 Q. Is that what you have in mind, or do
23 you have something?

24 A. No, that is what I have in mind
25 exactly. I mean, if the crime is bad enough and

1 severe enough and the circumstances point to it,
2 then if the death sentence is warranted then it
3 should be carried out, you know, rather than
4 tell someone: Look, we are going to put you to
5 death, but we are going to put you in this
6 little bitty room over here and let you stew on
7 it for a year or two knowing that somewhere down
8 the line your number is going to be pulled.
9 But if you tell somebody because the
10 circumstances pointed to it and said: Okay,
11 look, you know, we don't feel that you need to
12 go, if we sentence you to life, at least you
13 will have the opportunity to live in a different
14 society, but you will have the opportunity to
15 live and grow.

16 Q. Okay. I am getting a sense that you
17 have some feelings -- there is something going
18 on in the system that you don't approve of in
19 the sense of not carrying out the death penalty.

20 A. Yeah.

21 Q. More efficiently. Do you have a feel
22 for why that is, why there is a delay in
23 carrying it out?

24 A. That's politics. I have nothing to do
25 with politics at all. It's like if you tell the

1 person that that is what you are going to do and
2 they are expecting it, then they are going to
3 live their life knowing it's going to happen.
4 That is, to me, that is more torture. That is
5 mental torture, too.

6 Q. Do you think sometimes that there are
7 steps in the legal process where perhaps the
8 defendant is delaying that execution?

9 A. It's possible. You know. But, I
10 mean, I don't know that. Nobody that watches
11 TV, nobody on the outside really knows what is
12 going on, you know, not as far as that goes.

13 Q. Okay. Those thoughts and concerns
14 that you have, do you think would those affect
15 whether you assess or how you answered those
16 questions?

17 A. No.

18 Q. Are you one of the people -- several
19 people had spoken up yesterday that were
20 concerned about early parole. I don't remember
21 whether you did or not.

22 A. No, I didn't.

23 Q. Because I think you know the judge is
24 going to tell you you shouldn't consider that.

25 A. That's right.

1 Q. Is that an instruction that you could
2 follow?

3 A. Sure. Early parole is just like
4 anything else. You have x number of people
5 that's going to be here; yet, when you exceed
6 this, concessions have to be made. It's
7 life. Concessions have to be made. Early
8 parole, some people warrant it, some people
9 deserve it, some people deserve to stay right
10 where they are. It's all a matter of what the
11 case and what their situation is.

12 Q. That would not affect your decision?

13 A. No.

14 Q. To go back to whether you think the
15 death penalty is necessary in some cases. Did I
16 understand you to say you think it is in some
17 cases?

18 A. In some cases, yeah.

19 Q. Judge went over the long list of those
20 offenses that are included in the capital murder
21 statute. Are things like murder during the
22 course of a robbery, is that the kind of thing
23 you think the death penalty should be available
24 for?

25 A. I don't know. I really don't know.

1 I mean, was he running out of the building and
2 fired a missing shot and didn't know what it hit
3 and someone died because he didn't know where it
4 went or did he stand over the person and shoot
5 them multiple times? It depends on the
6 circumstances.

7 Q. Okay. Well, and whenever we talk
8 about capital murder we are talking about
9 intentional killing. We are not talking about
10 some accidental shooting.

11 A. Right. I am aware of that.

12 Q. So assuming that always we are talking
13 about intentional killing, if that was the case?

14 A. Right.

15 Q. Do you think, if you were going to
16 write the capital murder statute, would you
17 include murder during the course of a robbery?

18 A. Well, to get to the very beginning, I
19 wouldn't write the statute to start off with. I
20 would leave that to somebody else.

21 Q. You are too smart for that?

22 A. Exactly. Yeah, it would be
23 included. I mean, I have no problems right now
24 with the way the system is set up because it
25 works.

1 Q. Okay.

2 A. Okay. I mean, it's changing to fit
3 the needs, but, you know, it changes through due
4 process, not through somebody injecting their
5 opinion.

6 Q. Do you feel like if -- well, let me
7 back up. Types of crime. Killing more than one
8 person intentionally in the same transaction,
9 does that sound like an offense--

10 A. That sounds more like an offense that
11 would be considered capital punishment. You
12 also take into consideration, if you find a
13 person guilty of doing that, then how many
14 people are guilty of capital murder that went to
15 Vietnam? They killed multiple people over
16 there, too.

17 Q. Well, I understand that.

18 A. I mean, that is the same principle
19 that you are, same point in fact that you are
20 bringing up. But it depends on the situation
21 once again. If a person is attacked by two
22 people and he does manage to kill them, you
23 know, I mean, that is capital murder, but
24 depending on the circumstances. That is all
25 that I can look at. I can't tell you what my

1 feelings are until I see the facts, until I know
2 what I am trying to judge.

3 Q. I know that you can't tell me what you
4 are going to do in this case. I am not going
5 to ask you what you are going to do in this case
6 because you don't know the facts of this case or
7 any particular fact situation. I am just trying
8 to get a feel for your general attitudes.

9 I guess what I am not sure of is where
10 you are coming from in comparing capital murder
11 to killing during war.

12 A. You are talking about capital murder
13 being killing more than one person. It's the
14 same thing in a war situation where they go and
15 they have to kill more than one person.

16 Q. Well, both sides are involved there.

17 A. Exactly.

18 Q. I think most of us would see victims,
19 people who were just citizens, civilians on the
20 street or in their homes or whatever being
21 killed, being a little different than a war time
22 confrontation.

23 A. Yeah, that is a lot different.

24 Q. Okay. And, so, then that is what we
25 are talking about. We are talking about peace

1 time civilians, somebody who didn't ask or
2 willingly become involved.

3 A. Okay.

4 Q. Some people say that they believe the
5 death penalty is necessary in some situations
6 but they would not personally ever be able to be
7 involved in rendering a verdict that was going
8 to result in the death penalty. How do you feel
9 about that?

10 A. That is a good question because, like
11 the judge said, all I have to do is answer those
12 two questions. And if I answer those two
13 questions honestly based on how I feel and on
14 the facts of the situation, then it's up to
15 everyone else what they want to do with it.

16 Q. Well, okay. In answering those
17 questions, you answer them honestly, but you are
18 back there deliberating with eleven other
19 jurors, and it's not like everybody casts one
20 vote, we are through. You deliberate, you talk,
21 you compare. Somebody might change their mind,
22 somebody might not. You compare notes, you
23 discuss the evidence, hopefully you reach a
24 consensus.

25 A. Okay.

1 Q. You each have your own opinion, but
2 you do compare opinions and discuss the
3 evidence, consider it, reconsider it. Your
4 answer, you don't write death or life, you
5 answer those questions yes or no.

6 A. Exactly.

7 Q. You know going in what the result is.

8 A. Uh-huh.

9 Q. Obviously. You know if you answer
10 yes, no the judge has no choice but to give the
11 death penalty.

12 A. Uh-huh.

13 Q. You don't answer that way, you know,
14 if it's the opposite, you give a no answer to
15 that first one or whatever, the judge has no
16 choice but to give a life sentence.

17 A. Uh-huh.

18 Q. Clearly, if you want to achieve
19 certain results you can if you are inclined to
20 do that. You know, some people would say I
21 could not be a part of something that was going
22 to result in the death penalty. I couldn't
23 live with myself after that, you know, I am
24 going to answer those questions to be sure that
25 doesn't happen.

1 A. Okay.

2 Q. I need to know how you feel.

3 A. I don't have an opinion one way or the
4 other on that.

5 Q. Last night after you left here, did
6 you give any thought to, I mean, we are talking
7 about possibility of the death penalty. Does
8 that present a problem for you, that you think:
9 Gee, I don't know if I could do that?

10 A. Not a bit.

11 Q. Do you feel like you could do it?

12 A. Sure.

13 Q. If the evidence was there?

14 A. If the evidence was there.

15 Q. I have to ask because you emphasized
16 the word if. Are you telling me that: Lady,
17 there is no way you could ever bring me enough
18 evidence?

19 A. No.

20 Q. If I brought you the evidence that
21 convinced you, you could answer those questions
22 in such a way to result in the death penalty?

23 A. Yes, ma'am.

24 Q. Sounds like if I didn't bring it you
25 would answer them in such a way that was going

1 to be life sentence?

2 A. If that is it. If the facts are
3 there. Okay. Because I don't know the
4 situation. I don't know anyone involved in
5 this, and, I mean, the only thing I have to go
6 on is what you tell me I have to make a decision
7 on. And I have been taught in the service that
8 if you follow the facts that is what you have to
9 live with, you know.

10 Q. Tell me if I am understanding you
11 correctly. You are going to look at the
12 evidence, you are going to answer those
13 questions based on the evidence, let the chips
14 fall where they may?

15 A. Pretty much.

16 Q. If the result is the death penalty,
17 fine?

18 A. If that is the way it goes, then that
19 is what I have to live with.

20 Q. Do you feel like you could live with
21 that?

22 A. If it come down to that.

23 Q. Sometimes I would be asking a jury to
24 answer those questions yes, no, in other words,
25 resulting in the death penalty, based on the

1 facts of just the offense that is on trial. In
2 other words, sometimes there is no background
3 information, no past history introduced.

4 A. Okay.

5 Q. Just the facts of the case that is on
6 trial. Can you see that ever being a
7 possibility?

8 A. Yeah. Yeah, it's a possibility.

9 Q. Other times there may be additional
10 evidence, but not always. Does that seem fair
11 enough to you?

12 A. It's fair.

13 Q. Mentioned beyond a reasonable doubt.
14 We have used that term. Burden of proof is
15 always on the State.

16 A. Uh-huh.

17 Q. And I have to prove the case beyond a
18 reasonable doubt. There is a lengthy
19 instruction explaining what beyond a reasonable
20 doubt means, and it makes clear that it does not
21 mean beyond all doubt. I need to know how you
22 feel about that. The reason is some people come
23 in here and they tell me, when you are talking
24 about capital murder and you are talking about
25 the death penalty, beyond a reasonable doubt

1 just isn't enough, I have to have absolute
2 certainty. How do you feel?

3 A. I don't understand the question that
4 you are asking, really.

5 Q. I want to know whether you are going
6 to require more than beyond a reasonable doubt
7 of me.

8 A. I don't think so.

9 Q. I mean, the reason I am asking, beyond
10 all doubt is impossible.

11 A. Exactly. That is like being perfect.

12 Q. Yeah. I can't do that.

13 A. Right.

14 Q. So if I am talking to somebody, you
15 know, if you need that, if you are going to
16 require that, out of all fairness, I need to
17 know.

18 A. Okay.

19 Q. That is why I am asking. Do you
20 think beyond a reasonable doubt is a standard?

21 A. Yes.

22 Q. That is the legal standard. You could
23 live by that?

24 A. Yes, ma'am.

25 Q. I have to prove two intentional

1 murders. I suggested yesterday when we talked
2 that the intent to kill, like the intent to do
3 anything, can be formed very quickly. Do you
4 have any disagreement with that?

5 A. No, I don't.

6 Q. One thing we didn't talk about was the
7 idea of self-defense. That concept -- and you
8 said something a minute ago that kind of touched
9 on that, talking about somebody being attacked.
10 You know, do you feel like you have the right to
11 defend yourself?

12 A. Yes.

13 Q. And others. You have the right to
14 defend a family member or friends if the
15 situation requires it.

16 A. Sure.

17 Q. Even your property under certain
18 circumstances.

19 A. True.

20 Q. The law certainly gives you that
21 right, gives all of us that right.

22 A. Within limits, yeah.

23 Q. Absolutely. You are right, within
24 limits. And those limits, sometimes it gets
25 garbled, who has the right to self-defense.

1 When we get into these different fact
2 situations, it can get confused at times, so I
3 want us to talk about that a little bit.
4 Hypothetical example, just to kind of get your
5 reaction and your feeling. Let's say Joe is
6 working late tonight. He stays at the office
7 late, it's after hours, office is closed. There
8 is a sign on the door that says we are open from
9 nine to five. It's ten o'clock at night. He is
10 in the back working. He didn't bother to lock
11 the front door. He is in the back. Hears a
12 sound out in the front office. Thinks: What's
13 that? I better go check. He is a little
14 concerned so he grabs something for safety
15 sake. They play ball in a baseball league, so
16 there is a bat there in the office. He picks
17 that up, goes out in the front office and, sure
18 enough, there is a burglar ransacking the
19 drawers, looking for petty cash. Burglar turns,
20 wrestles that baseball bat out of Joe's hand,
21 beats Joe in the head, beats him to death.
22 Comes trial time, the burglar says: Hey, it was
23 self-defense, the man came after me with a
24 baseball bat. What is your reaction to that?

25 A. Was killing him necessary?

1 Q. Well, I mean, you said there were
2 certain limits. Whether that amount of force
3 was necessary is one of the questions, I think.

4 A. Exactly. That would determine
5 self-defense.

6 Q. One of the things -- of course, the
7 law of self-defense also requires you have to be
8 acting lawfully. For you to have the right to
9 self-defense, you have got to be responding to
10 someone else's unlawful use of force. My
11 suggestion is there is nothing unlawful about
12 Joe grabbing something to protect himself in a
13 situation like that. Do you think?

14 A. None whatever.

15 Q. I mean, do you think a person has the
16 right in that kind of encounter to protect
17 themselves?

18 A. Yes.

19 Q. So I think the question is, the law
20 would say, yeah, you can defend yourself, but
21 only, number one, you have to be acting
22 lawfully, then you can only use the amount of
23 force that is immediately necessary in the
24 circumstances. Not only that--

25 A. I am aware of the use of deadly force.

1 Q. Pardon me?

2 A. I am aware of the laws surrounding the
3 use of deadly force. I still remember that from
4 the service.

5 Q. Okay. And Texas also adds another
6 requirement, that you retreat if a person, a
7 reasonable person would do so in the
8 circumstances.

9 A. Uh-huh.

10 Q. So the question that kind of comes up
11 in that kind of situation, do you think what
12 would be reasonable would be for the burglar to
13 retreat? He doesn't belong there in the first
14 place. Not Joe. It's his office.

15 A. Yeah, I agree.

16 Q. What about the fact that Joe left the
17 door open?

18 A. That was his negligence.

19 Q. He was careless.

20 A. Exactly.

21 Q. Does that make it okay for the burglar
22 to come in?

23 A. No.

24 Q. What about if you were in a rush when
25 you leave your house and don't lock the door?

1 A. Same thing, it's your negligence.

2 Q. Negligence. But what about if
3 somebody comes in, do you think, well, that is
4 understandable, I should have locked the door?

5 A. No.

6 Q. Or, I mean, say you were in such a
7 hurry it didn't even catch good and it was
8 ajar. Is that an invitation to say: Hey, come
9 on in, everybody?

10 A. No. All locks are for is to keep
11 honest people honest. If a burglar wants what
12 you have got, he will find a way to get in and
13 get it.

14 Q. I think you are probably right.
15 You're right. Would it make any sense to you
16 for a burglar to say: Well, the guy didn't lock
17 the door, I thought it was okay to go in? Or
18 the door was standing open, so I went in,
19 fine.

20 A. Depends on if he said that or not.
21 If he went in to see what was wrong because the
22 door was standing open, then why was he going
23 through the drawers? Why didn't he say
24 something when he entered the building?

25 Q. In that situation, I think that is a

1 good question.

2 A. Okay.

3 Q. And then it would come down to
4 credibility, too. If they said I went in to
5 see if something was wrong, you might look at
6 the circumstances and think does that ring true
7 or not.

8 A. Uh-huh. If you went in to see if
9 something is wrong and somebody is running at
10 you with a bat, what is your natural response?

11 Q. My natural response would be to turn
12 around and run.

13 A. Okay.

14 Q. What about yours?

15 A. I would do the same thing.

16 Q. Okay.

17 A. I have no intention of trying to
18 wrestle with someone.

19 Q. Okay. Can you understand that if
20 somebody did, I mean, if an intruder, an
21 uninvited person came into the house, that also
22 you think it would be appropriate for somebody
23 to grab something to protect themselves?

24 A. Yes.

25 Q. Check out what is going on, what that

1 person is doing in the house or the office.

2 A. Uh-huh.

3 Q. That first stage of trial, you only
4 hear evidence about the case itself, the capital
5 murder case itself.

6 A. Okay.

7 Q. After you hear that evidence and the
8 attorneys' argument and the instructions from
9 the judge, the jury deliberates. Hopefully,
10 they will reach a verdict. After they have
11 reached a verdict of guilty of capital murder,
12 that is when you go to the second stage of
13 trial. There may or may not be additional
14 evidence. If there is, it can come from either
15 source. The defense never is obligated to
16 produce any evidence, but they can if they want
17 to. They have the same subpoena power. But the
18 only one with any responsibility to present
19 evidence is me, the State.

20 A. Uh-huh.

21 Q. You could hear all kinds of evidence
22 at that second stage of trial. Past criminal
23 history or good past, you know, went to church,
24 always held a job, always took care of his
25 family, never got in trouble before.

1 Mitigating stuff. Could be stuff about
2 childhood, sad stories about childhood, drug
3 addiction, whatever. You consider all of it as
4 you look at those two questions. Can you see,
5 looking at that first question, talking about
6 probability of being a continuing threat to
7 society, it's really asking about the future.
8 Not with a certainty but a probability. Do you
9 think that that question could ever be answered
10 yes, that someone would probably commit acts of
11 violence in the future that would be a
12 continuing threat to society?

13 A. Yes. Depending on the person.

14 Q. And the evidence that you have about
15 what they have done and whatever background
16 information you have.

17 Talks about criminal acts of
18 violence. Doesn't say murder.

19 A. Uh-huh.

20 Q. Can you see that some acts of violence
21 short of murder, that there are other criminal
22 acts that would be a threat to society?

23 A. Yes, ma'am.

24 Q. If the evidence was there to convince
25 you to answer that question yes, could you do so?

1 A. Yes, ma'am.

2 Q. Knowing that that is one step on the
3 way to the death penalty?

4 A. Uh-huh.

5 Q. You could. Is that term society, by
6 the way -- I think the judge touched on this --
7 includes everybody. Certainly isn't limited to
8 prison society, but includes them, too, as well
9 as free society. Can you do that?

10 A. Yes, ma'am.

11 Q. If the jury has answered that question
12 yes, then you move to the second question.
13 Basically at that point you have found somebody
14 guilty of capital murder and the jury has agreed
15 that he is a continuing threat to society. And
16 this is telling you now look at the evidence
17 again, remember consider the crime he committed,
18 weigh it again with any mitigating circumstances
19 that are there, and you decide are there
20 sufficient mitigating circumstances that this
21 person deserves a life sentence instead of the
22 death penalty. If you think there is
23 sufficient mitigation, you answer it yes, the
24 result is life sentence. You might think there
25 is some mitigation but it's not sufficient, not

1 enough to outweigh what he has done. You would
2 answer it no. The result would be the death
3 penalty. Can you see that going either way?

4 A. Yes, ma'am.

5 Q. Can you ever see a situation where
6 there is some mitigation but it wouldn't be
7 enough for you, you might think, well, there is
8 some mitigating stuff, sure, he had some things
9 to his credit, but it's not sufficient, he still
10 deserves the death penalty? Can you see that
11 ever happening?

12 A. Yes, ma'am.

13 Q. It's not just anything mitigating at
14 all is always going to be enough for you?

15 A. I don't know. I mean, I can't tell
16 you what I am going to do until I hear.

17 Q. I understand that.

18 A. Okay. I don't prejudge anything.

19 Q. I understand you can't tell me what
20 you are going to do. I just want to be sure, I
21 mean, in other words, different mitigation is
22 going to weigh differently different times.
23 Does that sound fair?

24 A. Yes.

25 Q. Do you have any questions for me?

1 A. No.

2 MS. DAVIES: Thanks. Pass.

3 EXAMINATION BY THE DEFENSE

4 BY MR. STAFFORD:

5 Q. I think you are my neighborhood Radio
6 Shack manager. I live in Garden Oaks. You
7 are up at Ella and 43rd?

8 A. Right.

9 Q. How did you get involved in computers?
10 Back in high school?

11 A. In the Navy.

12 Q. What kind of computer games do you
13 play -- y'all have a little bit of everything
14 there to play with at Radio Shack.

15 A. Yeah, a little bit of everything. That
16 is what we play with, a little bit of
17 everything. Anything from Scrabble, Monopoly,
18 Sub-battle, any kind of tactical game.

19 Q. Y'all sell any softwear for your
20 computers there at all?

21 A. Yes.

22 Q. Like dictionaries for translation of
23 foreign languages? Whatever I want they have it
24 there?

25 A. If not, they can get it.

1 Q. They can get it for you.

2 As a child, what religion were you
3 raised as?

4 A. Baptist.

5 Q. McArthur is what part of town?

6 A. North side.

7 Q. The high school you went to. North
8 side is where?

9 A. Off of Aldine-Westfield and
10 Aldine-Mail Route. It's out towards Humble,
11 towards the Intercontinental Airport.

12 Q. Is that basically the area of town you
13 were raised in?

14 A. That and up in East Texas.

15 Q. Where in East Texas?

16 A. Up around Tyler.

17 Q. Tyler Rose?

18 A. Uh-huh.

19 Q. What did your father do for a living?

20 A. He is a master mechanic and welder,
21 certified welder.

22 Q. Okay. I am not going to ask you very
23 many questions, but I think you have a little,
24 probably based upon your training as an M.P.,
25 you are a little step ahead of some of the

1 jurors, that you sense that punishment is often
2 handed out or meted out, depending on how the
3 crime was committed and why it was committed and
4 depending on the circumstances.

5 A. Right.

6 Q. I gather you would agree with me,
7 would you not, that all capital murder cases are
8 bad?

9 A. All capital murder cases are bad,
10 yeah.

11 Q. But we also know that just because I
12 am guilty of capital murder, you would agree
13 with me, that doesn't automatically mean I
14 deserve to die for it?

15 A. That's true.

16 Q. Because I think you have already told
17 the prosecutor there are situations where, for
18 example, using the Radio Shack, and a guy went
19 in and lined everybody up and shot them
20 execution style, that is one scenario in a
21 course of a robbery where maybe you caught
22 someone burglarizing -- not you, or one of your
23 employees confronted him and they have a tussle,
24 and wouldn't you agree with me that probably a
25 robber or burglar's desire to live is just as

1 great as an innocent person's desire to live,
2 they both want to live?

3 A. Sure.

4 Q. When they are both facing death, they
5 are going to react probably in a manner to
6 protect their lives even though one is there
7 unlawfully and one is there lawfully?

8 A. True.

9 Q. Those are factors which I contend are
10 mitigating factors that you can take into
11 consideration. Did he execute them? Did he
12 come in there with a weapon to do a dastardly
13 deed. Things like that to aid you to determine
14 whether one lives or dies. Do you think that
15 is a fair thing to look at?

16 A. Yes.

17 Q. Have you ever -- I am curious, since
18 you are the manager of the store, how much
19 hardship two weeks is going to cause you if you
20 are down here for two weeks. You are not going
21 to get fired, I hope.

22 A. I don't know. I doubt that I will get
23 fired. I may be put in a different position,
24 but I won't be fired. Tandy Corporation is not
25 like that.

1 Q. Y'all close at six?

2 A. Seven.

3 Q. Seven o'clock?

4 A. Uh-huh.

5 Q. How long have you been a manager
6 there?

7 A. I have been a manager roughly one
8 month.

9 Q. You are a baby manager?

10 A. Exactly. A rookie.

11 Q. You have already finished your
12 training?

13 A. Yes. I have already been to Fort
14 Worth and back.

15 Q. That is my home town now, Fort Worth
16 is. So this is your first store?

17 A. Right.

18 Q. Oh, good. Well, it's unfortunate
19 that this came at this particular time, I guess,
20 for you.

21 A. I got the summons I think it was like
22 two weeks before I got promoted, so they knew I
23 was coming down here, and they still elected to
24 promote me.

25 Q. Well, good. Congratulations.

1 MR. STAFFORD: I have no other
2 questions, judge.

3 THE COURT: Why don't you step outside
4 this second door right here for just a minute?

5 (The prospective juror leaves the
6 courtroom).

7 (Off the record)

8 THE COURT: Bring him in and swear
9 him.

10 (The prospective juror returns to the
11 courtroom)

12 THE COURT: Mr. Whitten, you have been
13 selected to serve. Lucky you. Not exactly
14 like being drafted. First raise your right
15 hand.

16 (Juror sworn)

17 THE COURT: You are the last person we
18 are selecting. We are wrapping it up. She's
19 going to give you one piece of paper which tells
20 you we are going to begin testimony on Monday,
21 September 28th, at ten a.m. in our courtroom,
22 which is on the floor above is, the eighth
23 floor. This gentleman is going to give you a
24 badge. Right there he is handing it to you.
25 You are to wear it at about chest pocket level.

1 It identifies you as a juror. You are to wear
2 that at all times when you are in and around the
3 courthouse from the time you get out of your car
4 in the mornings until you get back in it in the
5 afternoon. The attorneys are being instructed
6 not to engage you in conversation. If they run
7 into you, they will nod in recognition but not
8 talk. If anybody attempts to talk to you about
9 the case, bring it to our attention immediately,
10 call us or when you come in let somebody know.
11 I don't anticipate there is going to be anything
12 in the media, radio, TV, newspapers about this
13 case. If there was, it would only be to the
14 effect that the jury selection has been
15 completed and testimony is going to start on
16 Monday, the 28th. If you should see anything in
17 the newspaper, hear it, see it on TV or radio,
18 change the channel, turn it down, put it aside,
19 don't pay any attention to it. You are going to
20 have a front row seat to what is going on in the
21 case. Don't make any kind of independent
22 investigation. Don't try to read any law you
23 think might apply in the case. Don't attempt
24 to find out which capital murder case it is we
25 are trying starting Monday, September 28. When

1 you come in on the 28th, we ask that you not
2 come into the courtroom but remain out in the
3 hallway. You will see a bunch of people with
4 the same yellow tags on in that hallway on the
5 eighth floor. There are some benches past the
6 elevators to sit down. At ten o'clock I will
7 send the bailiff out to count heads and take you
8 in a group through the courtroom and back to the
9 jury deliberation room. I know your employer is
10 interested in some of this information. You
11 have to tell him you have been selected to
12 serve. Don't let anybody try to impart any
13 information about the criminal justice system or
14 capital murder cases or anything else. Most of
15 it will be misinformation, unfortunately. This
16 panel did not ask any questions about being
17 sequestered. I don't anticipate the jury will
18 be sequestered, will be locked up overnight in a
19 hotel. You will be going home every evening.
20 But the possibility usually arises once the jury
21 has been charged and you are back deliberating.
22 Try to charge them in the morning so they can
23 deliberate all day. We don't normally try to
24 rush a verdict. I will try to give you advance
25 notice the day before at least. As far as

1 hours, we won't ever be starting testimony, as
2 far as I can see, before ten a.m. Probably
3 won't be working much past 5:30.

4 Do you have any questions?

5 THE JUROR: No.

6 THE COURT: Any requested admonitions
7 or instructions, Ms. Davies?

8 MS. DAVIES: Nothing further.

9 THE COURT: Mr. Stafford?

10 MR. STAFFORD: None.

11 THE COURT: That's it. Also double
12 check his phone number and things. On the week
13 of Monday, September 21st, we are going to
14 verify all the people selected that they are
15 still supposed to come in on Monday, September
16 21st. If you haven't heard from us by Tuesday,
17 the 22nd, give us a call.

18 (End of session)
19
20
21
22
23
24
25

1 CAUSE NO. 612408

2 THE STATE OF TEXAS IN THE 179TH DISTRICT COURT

3 VS. OF

4 RICK ALLAN RHOADES HARRIS COUNTY, T E X A S

5
6
7 I, Marlene Swope, Official
8 Court Reporter of said court, hereby certify
9 that the foregoing 3729 pages comprise a true,
10 complete, and correct transcript of the voir
11 dire examination of prospective jurors had in
12 the above styled and numbered cause.

13 WITNESS MY HAND this, the 17th
14 day of October, 1992.

15
16 Marlene Swope
17 Marlene Swope
18 Official Court Reporter
19 179th District Court
20 Harris County, Texas
21 Certificate NO. 164
22 Expires: December 31, 1992
23
24
25